

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

75-1435

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United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

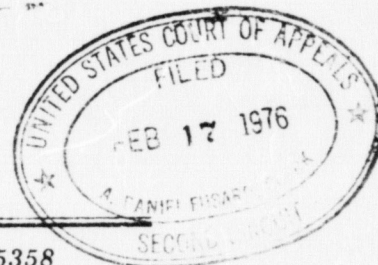
-against-

YUK CHOI CHUNG, a/k/a DAVID CHAN,

Appellant.

Appellant's Appendix

GILBERT ROSENTHAL
Attorney for Appellant Yuk Choi Chung,
a/k/a David Chan
401 Broadway
New York, N.Y. 10013
(212) 226-7971



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JUDGE TENNEY ¹

74 CRIM. 846

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.:
VS.	James E. Nesland, AUSA.
LAM LEK CHONG, a/k/a Jimmy Lam-1	264-6470
YUK CHOI CHUNG, a/k/a David Chan-1	
FRANCISCO LI-1&2	
FILED - CHUNG: 12/22/75	
LI GOALDZA: 12/23/75	
	For Defendant:
	(1) Michael Corriero
	110 E. 59th St, NYC 10022
	tele: 758-3152

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
(07)					
Fine, ✓					
Clerk, ✓					
Marshal,					
Attorney,					
XXXXXXX 21					
XXXXXXX 846,812,841(a)(1),(b).					
Consp. to viol. Fed. Narco. Laws. (Ct.1)					
Distr. & possess. w/intent to distr. Heroin, I. (Ct.2)					
(Two Counts)					

DATE	PROCEEDINGS
8-29-74	Filed indictment.
9-9-74	Deft. Chong (No appearance. Court directs entry of not guilty plea. B/W ordered.
	Deft. Chung (atty. present) Pleads not guilty. Bail continued as fixed by Mag. (\$20,000. P.R.B. secured by \$2,000. cash or surety. Deft. ordered photographed and fingerprinted.
	Deft. Li (atty. present) Pleads not guilty. Bail fixed in the sum of \$2,000. cash or surety to be posted by 9-10-74 at 3:00 P.M. Deft. to be photographed and fingerprinted. All defts. motions returnable in 10 days for motions. Case assigned to Judge Tenney for all purposes.
	Edelstein, J.
9/9/74	Lam Lek Chong - bench warrant issued. Tenney, J.

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
9/11/74	Filed appearance bond for Francisco Li in the sum of \$2,000. Approved Clerk 9/11/74.		
9/26/74	Filed deft. Chung's notice of motion re: suppression, severance, copy & inspection ret; (no date)		
10/8/74	Lam Lek Chong- filed notice of appearance by atty. (front)		
10/3/74	Deft. produced on writ. (Lam Lek Chong) (atty. present) deft. pleads not guilty. Deft. released on own recognizance. Writ satisfied. Tenney, J.		
10/2/74	Filed Govt.'s affdvt. for deft. Lam Lek Chong for writ of habeas corpus ad pros. ret. 10/3/74.		
10/31/74	Filed Govt.'s notice of readiness for trial.		
05-13-75	Filed deft. F. Ligonozza's notice of motion for suppression, etc. ret. 5-23-75.		
09-25-75	Filed Govt.'s requested voir dire questions of prospective jurors.		
10-1-75	L.L. Chong-filed CIA 23 financail affdvt.		
9-24-75	Filed Govt.'s affdvt. for writ of habeas corpus ad pros. for Lam Lek Chong. Writ issued ret. 9-30-75.		
10-14-75	All defts.-jury trial begun before Judge Tenney.		
10-15-75	Trial cont'd.		
10-16-75	Trial cont'd.		
10-17-75	Trial cont'd.		
10-20-75	Trial cont'd.		
10-22-75	Trial cont'd.		
10-23-75	Trial cont'd.		
10-28-75	Trial cont'd.		
10-29-75	Trial cont'd.		
-cont'd. on next page-			

C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Order Judgment
10-30-75	Trial cont'd.	
10-31-75	Trial cont'd.	
11-3-75	Trial cont'd.	
11-4-75	Trial cont'd.	
11-5-75	Trial cont'd.	
11-6-75	Trial cont'd.	
11-7-75	Trial cont'd.	
11-10-75	Trial cont'd.	
11-11-75	Trial cont'd. Lam Lek Chong a/k/a Jimmy Lam, Yuk Choi Chung a/k/a David Chan Francisco Liganoza -jury found defts. guilty on count 1. Tenney, J. Lam Lek Chong- Presentence investigation ordered. Sentence adjourned until 12-18-75 at 9:30AM. Writ adj'd until 12-18-75. Yuk Choi Chung-Presentence investigation ordered. Sentence adj'd. until 12-18-75 at (9:30AM.) Bail increased to \$7,500. deft. remanded in lieu of bail. Tenney, J. Francisco Liganoza-jury unable to agree as to count 2. Pre-sentence investigation ordered. Sentence adj.'d until 12-18-75 at 9:30AM. deft. remanded. in lieu of bail fixed at \$25,000. Tenney, J.	
11-12-75	Filed one envelope containing Court's Exhibits.	
11-21-75	Filed Order that Philip Chan, 62 Birch St. Port Wash. N.Y. be engaged as interpreter for a two hour period, fee not to exceed \$30.00. pursuant to authority conferred by Rule 28(b) of FRCP. Tenney, J. (for deft. Francisco Li Ganoza)	
11-21-75	Filed Order that Philip Chan, 62 Birch St., Port Wash. N.Y. be engaged as interpreter for a two hour period, fee not to exceed \$30.90 pursuant to authority conferred by Rule 28(b) of FRCP. Tenney, J. mn	
11-12-75	Y. Chung-filed appearance bond in the sum of \$7,500.	
11-28-75	Y. Chung-filed remand dated 11-12-75.	
12-3-75	L. Chong-filed CJA 21 appointment of Philip M. Chan Interpreter. 62 Birch Street, Port Washington New York 11050. Tenney, J.	
12-3-75	L. Chong-Filed CJA 21 approval for payment of fees of interpreter. Tenney, J.	
12-10-75	Filed proposed questions of voir dire, by deft.	
12-10-75	Filed deft.'s additional requested voir dire of prospective jurors.	
2-19-75	Filed deft. Lam Lek Chong's motion for bill of particulars and discovery and suppression of evidence.	
12-19-75	Filed Govt.'s memo. of law in opposition to deft. Lam Lek Chong's pre-trial motions.	
12-19-75	Filed Pre-sentence memo. of law on behalf of Yuk Choi Chung.	
12-19-75	Filed Govt.'s affdvt. re: opposition to the motion of deft. F. LiGanoza to suppress evidence seized as a result of an illegal search, etc.	

-over-

DATE	PROCEEDINGS	Date of Judgment
-19-75	Filed Govt.'s bill of particulars.	
18-75	FRANCISCO LIGANOZA (atty. present) Filed JUDGMENT - 7 yrs. impr. on count 1. Pur. to the provisions of 21;841 U.S. Code. S.P. 3 yrs. Count 2 dismissed. Tenney, J. issued all copies.	
-18-75	YUK CHOI CHUNG (atty. present) Filed JUDGMENT - 5 yrs. impr., serve 3 mons. remainder of sent. E.S.S., 4 yr. 9 mons. prob. w/super. Pursuant to the provisions of Sec. 841 of T. 21, U.S. Code. deft. is placed on Special Parole for a period of 3 yrs. Period of prob. and S.P. are to run conc. with each other., and to commence upon expiration of confinement. Bail pending appeal is cont'd. on condition that the deft. promptly prosecutes his appeal in accordance with the rules of this Court and the rules of the Court of appeals for this Circuit. Tenney, J. issued all copies.	
-18-75	LAM LEK CHONG (atty. present) Filed JUDGMENT - 8 yrs. impr. 3 yrs. S.P. The Court recommends that the sent. imposed in this case be served conc. with the sent. imposed upon the deft. in the N.Y. Supreme Court and that if the Atty. Gen'd. finds that the state institution to which he is committed for service of the N.Y. Sent. is suitable for the service of the Fed. prison sentence., that he serve this sent. at that state institution, pursuant to the provisions of Sec. 4082(b) of T. 18, U.S. Code the Court further recommends that confinement at Metropolitan Corr. Center be cont'd., until the completion of any medical test the deft. may be undergoing at the institution. Tenney, J. issued all copies.	
2-22-75	Filed Y. Chung's notice of appeal from judgment of 12-18-75. mailed copies.	
2-23-75	Filed deft. F. Li Gonoza's notice of appeal from judgment of 12-18-75. mailed copies.	
JANUARY 19-76	Transcript of record of proceedings dtd. Oct. 8-10-75.	
JANUARY 19-76	Transcript of record of proceedings dtd. Oct. 14-17 and Oct. 20-23-75.	
JANUARY 19-76.	Transcript of record of proceedings dtd. Oct. 28-31 and Nov. 3-5-75.	
JANUARY 19-76	Transcript of record of proceedings dtd. Nov. 6-11-75.	

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

INDICTMENT

v

74 Cr. 846

LAM LEK CHONG, a/k/a Jimmy Lam,
YUK CHOI CHUNG, a/k/a David Chan,
and FRANCISCO LI,

Defendants.

-----X

The Grand Jury charges:

1. From on or about the 1st day of January, 1974
and continuously thereafter up to and including the date
of the filing of this indictment, in the Southern District
of New York,

LAM LEK CHONG, a/k/a Jimmy Lam,
YUK CHOI CHUNG, a/k/a David Chan, and
FRANCISCO LI,

the defendants, and others to the Grand Jury unknown, unlaw-
fully, intentionally and knowingly combined, conspired, con-
federated and agreed together and with each other to violate
Sections 812, 841(a)(1), 841(b)(1)(A), 951(a)(1), 952(a),
960(a)(1) and 960(b)(1) of Title 21, United States Code.

2. It was part of said conspiracy that the said
defendants unlawfully, intentionally and knowingly would
import into the United States from a place outside thereof,
to wit, Hong Kong, large quantities of heroin, a Schedule I
narcotic drug controlled substance, the exact amounts thereof

INDICTMENT

being to the Grand Jury unknown, and to distribute, and possess with intent to distribute, said heroin within the United States, in violation of Sections 812, 841(a)(1), 841(b)(1)(A), 951(a)(1), 952(a), 960(a)(1) and 960(b)(1) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

(1) On or about February 14, 1974, defendant LAM LEK CHONG, a/k/a Jimmy Lam, had a meeting with two other persons at The New York Hilton Hotel, 1335 Avenue of Americas, Manhattan, and negotiated for the importation and sale of heroin from Hong Kong.

(2) On or about March 12, 1974 defendant LAM LEK CHONG, a/k/a Jimmy Lam, introduced defendant YUK CHOI CHUNG, a/k/a David Chan, to two other persons at the City Squire Motor Inn, 790 Seventh Avenue, Manhattan, and discussed with them the manner of importing heroin into the United States from Hong Kong.

(3) During March and April, 1974, defendants LAM LEK CHONG, a/k/a Jimmy Lam, YUK CHOI CHUNG, a/k/a

INDICTMENT

David Chan, and FRANCISCO LI traveled from New York City to Hong Kong.

(4) On or about April 21, 1974, defendant LAM LEK CHONG, a/k/a Jimmy Lam, delivered a sample of heroin to two persons at the Hyatt Regency Hotel in Hong Kong.

(5) On or about April 22, 1974 defendants LAM LEK CHONG, a/k/a Jimmy Lam, and FRANCISCO LI went to the Hyatt Regency Hotel in Hong Kong and made arrangements to deliver heroin.

(Title 21, United States Code, Sections 846 and 963.)

COUNT TWO

The Grand Jury further charges:

On or about the 30th day of May, 1974 in the Southern District of New York, FRANCISCO LI the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 678.15 grams of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), Title 18, United States Code, Section 2.)

Foreman

PAUL J. CURRAN
UNITED STATES ATTORNEY

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2 UNITED STATES OF AMERICA

3 V.

74 CRIM 846

4 LAM LEK CHONG, et al

5 November 10, 1975
6 10:30 a.m.

7
8 oOo

9
10 (Trial resumed.)

11 (In open Court - jury present.)

12 THE COURT: Members of the jury, we have now
13 come to that part of the case where all the evidence is
14 in, the lawyers have presented their arguments, and you
15 are about to exercise your final role, which is to pass
16 upon and decide the fact issues that are in this case.

17 First, I want to express my thanks to each of
18 you for your faithful devotion to your duties in this case.
19 It's your responsibility to reach a just decision in the
20 determination of the charges against these defendants and
21 I know that you will deliberate toward reaching a verdict
22 fairly, honestly and conscientiously.

23 Now, as jurors, I want to impress upon you that
24 you are the sole and exclusive judges of the facts. You
25 pass upon the weight of the evidence, you resolve such

conflicts as there may be in the evidence, and you draw such reasonable inferences as may be warranted by the testimony or exhibits in the case.

My function at this point is to instruct you as to the law that is applicable to the case and it's your sworn duty to accept the law as I state it to you in these instructions and to apply it to the facts as you find the facts to be.

You are to perform this duty without bias or prejudice to the defendants or to the Government. The law does not permit jurors to be governed by sympathy or prejudice or bias. Both the parties and the public, as well as the Court, expect you to follow carefully and impartially what I have to say and to consider all of the evidence in the case and reach a just verdict.

Of course, it's your duty as jurors to consult with one another and to deliberate with a view towards unanimously agreeing upon a verdict, if you can do so without violence to your individual judgment and conscience.

With respect to any fact matter, it is your recollection and yours alone that governs. Anything that counsel either for the Government or the defense may have said with respect to matters in evidence, whether during the trial, in the form of a question, in argument or in summa-

tion, is not to be substituted for your own independent recollection of the evidence.

So too anything the Court may have said during the trial or may refer to in the course of these instructions as to any matter in evidence is not to be taken in place of your own recollection.

As I have instructed you during this trial, the case must be decided upon the sworn testimony of the witnesses and such exhibits as were received in evidence.

In addition, let me point out the fact that the Government is a party, that is, that the prosecution is brought in the name of the United States of America, entitles it to no greater consideration than that accorded to any other party to the litigation. By the same token, it is entitled to no less consideration. All parties, the Government and individuals alike, stand equal before the bar of justice.

Now, before we consider the charge itself and what is required to sustain it there are certain preliminary observations that are in order, certain principles of law that are applicable in every criminal case, and to which I made reference at the time of your selection as jurors.

First, the indictment is simply an accusation, a charge. It is no evidence or proof of the guilt of a

2 defendant. It is merely a means utilized by the Government
3 to bring a defendant before this Court. It is nothing more
4 or less. You will not give any weight whatever to the
5 fact that an indictment has been returned against these
6 defendants.

7 Now, the defendants have pleaded not guilty.
8 Therefore, the Government has the burden of proving by com-
9 petent evidence the charges made against them beyond a
10 reasonable doubt. Whether this burden is sustained does
11 not depend upon the number of witnesses or the quantity of
12 testimony, but rather on the nature and quality of the
13 testimony and the other evidence. It is a burden that never
14 shifts and remains upon the Government throughout the en-
15 tire trial.

16 A defendant does not have to prove his innocence.
17 On the contrary, he is presumed to be innocent of the accu-
18 sations contained in the indictment. The Government must
19 prove his guilt beyond a reasonable doubt.

20 Now, this presumption of innocence is not an idle
21 phrase to be taken lightly by the jury, but an important
22 right belonging to every person accused of a crime, and
23 each juror is bound to entertain it conscientiously, with-
24 out any mental reservations whatever, and to give these
25 defendants its full benefit.

As I told you at the start of this trial, this presumption of innocence was in the defendants' favor then, it was present during the entire course of the trial, it is in the defendants' favor even as I instruct you now, and remains in the defendants' favor during the course of your deliberations in the jury room. It is removed only if and when you, the members of the jury, are satisfied that the Government has sustained its burden of proving the guilt of the defendants beyond a reasonable doubt.

Now, the indictment in this case is in two counts. This means that two separate crimes are charged.

The first count charges that from on or about the 1st day of January 1974, up to and including August 29, 1974, the defendants Lam Lek Chong, also known as Jimmy Lam, Yuk Choi Chung, also known as David Chan, and Francisco Li Ganoza, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed to distribute and possess with intent to distribute a Schedule I narcotic controlled substance, that substance being heroin.

The indictment states that it was a part of said conspiracy to import heroin into the United States from Hong Kong in large quantities and to distribute and possess with intent to distribute the heroin in the United States.

The second count charges that on or about May

30, 1974, the defendant Francisco Li Ganoza unlawfully, intentionally and knowingly did distribute and possess with intent to distribute heroin.

To go into a little more detail, I will read you the indictment. With respect to the first count:

"The grand jury charges:

"From on or about the 1st day of January 1974 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, Lam Lek Chong, also known as Jimmy Lam, Yuk Choi Chung, also known as David Chan, and Francisco Li, the defendants, and others to the grand jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1), 841(b)(1)(A), 951(a)(1), 952(a), 960(a)(1) and 960(b)(1) of Title 21, United States Code.

"It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would import into the United States from a place outside thereof, to wit, Hong Kong, large quantities of heroin, a Schedule I narcotic drug controlled substance, the exact amounts thereof being to the grand jury unknown, and to distribute and possess with intent to distribute said heroin within

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2 the United States, in violation of Sections 812, 841(a)(1),
3 841(b)(1)(A), 951(a)(1), 952(a), 960(a)(1) and 960(b)(1)
4 of Title 21, United States Code."

5 Then going on to the second count:

6 "The grand jury further charges:

7 "On or about the 30th day of May 1974, in the
8 Southern District of New York, Francisco Li, the defendant,
9 unlawfully, intentionally and knowingly did distribute and
10 possess with intent to distribute a Schedule I narcotic
11 drug controlled substance, to wit, approximately 678.15
12 grams of heroin hydrochloride."

13 With respect to the conspiracy count, I have not
14 read the alleged overt acts, which I will come to and ex-
15 plain to you later.

16 Let me emphasize that conspiracy itself is a
17 crime. It is an agreement to violate other Federal laws.
18 Therefore, it should be clear in your minds that there
19 is a major difference between Count 1 of this indictment,
20 which charges a conspiracy, and Count 2, which charges a
21 substantive violation of law.

22 Count 1 of the indictment charges, as I said,
23 that the three defendants violated Sections 812, 841, 846,
24 951, 952 and 963 of Title 21 of the United States Code.

25 Section 841 states, in pertinent part:

"It shall be unlawful for any person knowingly or intentionally to manufacture, distribute or dispense or possess with intent to manufacture, distribute or dispense a controlled substance."

Section 812 sets forth controlled substances in various schedules. Schedule I of Section 812 lists as a controlled substance heroin.

Section 952 states in part that:

"It shall be unlawful to import into the Customs territory of the United States from any place outside thereof any controlled substance in Schedule I."

Section 951 defines "import" as any bringing in or introduction of any such article as described above into any area of the United States.

Section 960 states that a violation of Section 952 is unlawful and sets out the penalties which attach to a violation.

Section 846 makes it a crime to conspire to commit certain offenses, including the offense defined above in Section 841.

Section 963 makes it a crime to conspire to commit certain offenses, including the offense defined above in Section 952.

Count 2 of the indictment charges Francisco Li

Ganoza with violation of Sections 812 and 841 of Title 21 of the United States Code, which were previously described for you, and also charges a violation of Section 2 of Title 18 of the United States Code, which states in part that:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Now, as I mentioned earlier, the indictment in this case contains two counts. Each count charges a separate crime and they must be considered separately.

The indictment names three defendants in all, and you are familiar by now with their names. They are the only persons whose guilt or innocence you must announce in your verdict, although, as I will explain to you shortly, in considering their guilt or innocence you may have to determine the nature of the participation, if any, of others who are not named as defendants.

You must bear in mind that guilt or innocence is personal. The guilt or innocence of a person on trial before you must be determined separately with respect to him and solely on the evidence presented against him or the lack of such evidence. The case of each defendant stands or falls upon the proof or the lack of proof of the charge against him and not upon proof presented against someone

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2 else.

3 Finally, remember that you must return a verdict
4 as to the guilt or innocence of each defendant on each count
5 of the indictment separately. Also, bear in mind that any
6 verdict, whether of guilty or not guilty, must be unanimous.

7 Now we come to the crime charged in Count 1 of
8 the indictment. In order to convict Lam Lek Chong, also
9 known as Jimmy Lam, Yuk Choi Chung, also known as David
10 Chan, or Francisco Li Ganoza of the conspiracy charged in
11 Count 1 the Government must establish beyond a reasonable
12 doubt each of the following four elements against each of
13 the defendants charged:

14 First, the existence of the conspiracy charged in
15 the indictment.

16 Second, that the particular defendant whose guilt
17 or innocence you are considering willfully became a par-
18 ticipant in the conspiracy.

19 Third, that it was a part of this conspiracy to
20 import, to distribute or possess with intent to distribute
21 a Schedule I controlled substance. In this regard I instruct
22 you as a matter of law that heroin is such a substance.

23 Fourth, that at least one of the conspirators
24 knowingly committed an overt act during the period of the
25 conspiracy alleged in the indictment. I will explain the

matter of overt acts to you shortly.

Now, as to the first element that I just mentioned, the Government must prove beyond a reasonable doubt that a conspiracy existed. At this point some of you might be asking yourselves what is a conspiracy. Well, a conspiracy is a combination or agreement of two or more persons by concerted action to accomplish a crime or unlawful purpose or to accomplish some purpose that is not itself criminal, but to do so by criminal or unlawful means.

The gist of the crime of conspiracy is the unlawful combination or agreement to violate the law. Whether or not the persons charged in the indictment accomplished what it is alleged they conspired to do is immaterial to the question of their guilt or innocence.

A conspiracy has sometimes been called a partnership in criminal purposes in which each member becomes the agent of every other member. However, to establish a conspiracy the Government is not required to show that two or more persons sat around a table and entered into a solemn compact, orally or in writing, stating that they have formed a conspiracy to violate the law, setting forth the details of the plans, the means by which the unlawful project is to be carried out, or the part to be played by each conspirator. Indeed, it would be extraordinary if there were

2 such a formal document or specific oral agreement.

3 Your common sense will tell you that when men in
4 fact undertake to enter into a criminal conspiracy much is
5 left to unexpressed understanding. Thus, it is sufficient
6 if two or more persons in any manner, through any contri-
7 vance, impliedly or tacitly come to a common understanding
8 to violate the law. Express language or specific words
9 are not required to indicate assent or attachment to a
10 conspiracy.

11 In determining whether there has been an unlaw-
12 ful agreement you may judge acts and conduct of the alleged
13 members of the conspiracy which are done to carry out an
14 apparent criminal purpose. The adage that actions speak
15 louder than words may be applicable here.

16 Usually the only evidence available is that of
17 disconnected acts on the part of the alleged individual
18 conspirators, which acts, however, when taken together in
19 connection with each other and with the reasonable infer-
20 ences flowing therefrom show a conspiracy or agreement to
21 secure a particular result.

22 If upon consideration of all the evidence, direct
23 or circumstantial, you find beyond a reasonable doubt that
24 the minds of at least two of the alleged conspirators met
25 in an understanding way and that they agreed, as I have

1
2 explained a conspiratorial agreement to you, to work together
3 in furtherance of the unlawful scheme alleged in the indict-
4 ment, then proof of the existence of the conspiracy, but
5 only of its existence, is established.

6 Now, I have emphasized that in order for you to
7 find that a conspiracy existed you must find an agreement
8 by two or more persons. In considering whether there was
9 an agreement between two or more persons to violate the
10 law you may consider not only the persons named in the in-
11 dictment, but also the several other persons whose names
12 you have heard mentioned during the course of the trial
13 as being involved in the alleged scheme to violate the law.

14 For your assistance I will read a list of the
15 names. They are Chong Yin Hee, also known as Mike or Chris;
16 Kim Chow Chan, also known as James; Lim King Sing, also
17 known as Robert or Fatman or Sharkfish; Yeo Chin Nee, also
18 known as Sonny; and then there were two others, John Doe,
19 also known as Yuk Choi Chung's brother, and John Doe, also
20 known as Francisco Li Ganoza's uncle.

21 Thus, if you find from both the list of the defen-
22 dants and the list that I have just read to you that any
23 two or more of the persons agreed to violate the law, then
24 you may find that there was a conspiracy. You are to draw
25 no inference from the fact that some of the persons are

named in the indictment and some are not.

Now, the indictment alleges that the conspiracy was to import, to distribute and to possess with intent to distribute heroin, which, as I have stated, is a Schedule I narcotic drug controlled substance. The Government's proof may, but need not, establish all of these objectives of the conspiracy. If you find that the agreement had as its object any one of these unlawful activities, then you may be satisfied that the existence of the conspiracy is established.

Once again, in this connection, it is not necessary for the Government to prove the success of the conspiracy in order to show a violation of the statute. As a conspiracy is basically the agreement to violate the law, it may exist even though the final objectives were never accomplished. Thus, a conspiracy, if you so find it, may exist even though an importation or a distribution or a possession with intent to distribute was not accomplished.

Now, while the indictment charges that the conspiracy existed from on or about January 1, 1974 up to the date of the filing of the indictment on August 29, 1974, it is not essential that the Government prove that the conspiracy started and ended on or about those specific dates. It is sufficient if you find that in fact a conspiracy was

formed and existed for some substantial time within the period set forth in the indictment.

Now, if you have found that a conspiracy existed then we pass to the second element that I mentioned, that is, membership by a defendant in the conspiracy. If you do conclude that a conspiracy existed you must then determine whether the Government has proven beyond a reasonable doubt that the particular defendant under consideration was a member of the conspiracy.

In determining whether any of these defendants became a member of a conspiracy you must determine not only whether he participated in it, but whether he did so with knowledge of its unlawful purpose.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Mere association with one or more of the conspirators does not make one a member of the conspiracy, nor is knowledge without participation sufficient.

Before the jury may find that a defendant or any other person has become a member of a conspiracy the evidence in the case must show beyond a reasonable doubt that

the conspiracy was knowingly formed and that the defendant or other person who is claimed to have been a member willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To act or participate willfully means to act or participate voluntarily and intelligently and with specific intent to do something which the law forbids or with specific intent to fail to do something the law requires to be done, that is to say, to act or participate with the bad purpose either to disobey or to disregard the law.

So if a defendant or any other person with understanding of the unlawful character of a plan knowingly encourages, advises or assists for the purpose of furthering the undertaking or scheme he thereby becomes a willful participant, a conspirator.

Now, one who willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether a conspiracy existed the jury should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only that defendant's acts

and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed and that he was one of its members.

If you have found a conspiracy to exist and a particular defendant to have knowingly participated in it, the extent of his participation has no bearing on his guilt or innocence. The guilt of a conspirator is not measured by the extent or duration of his participation. So even if he participated in it to a degree more limited than that of his co-conspirators, he is equally culpable, as long as he was in fact a conspirator.

Finally, all of the conspirators need not be acquainted with each other. They need not have previously associated together. One of the defendants may know only one other member of the conspiracy, but if he enters into an unlawful agreement with that other member of the conspiracy he becomes a party.

Now, before I come to the third element of the crime of conspiracy I want to say a few words about the acts and statements of co-conspirators.

When people enter into a conspiracy to accomplish an unlawful end they become agents for one another in carrying out the conspiracy. Hence, the acts or declarations of one in the course of the conspiracy and in furtherance of

the common purpose are deemed to be the acts of all and all are responsible for such acts.

It is important to note that this principle normally applies only to the acts and declarations done or made during the continuance of the conspiracy and in furtherance of it, that is, to carry out an unlawful objective or purpose of the conspiracy. It does not apply to acts or declarations which do not have these characteristics.

However, where one joins an existing conspiracy he is deemed to have adopted the prior acts and declarations of the others who are already members of the conspiracy, to the extent that such acts and declarations are in furtherance of the conspiracy and the conspiracy is then in existence, even if he is not specifically aware of the acts or declarations, so long as they are done in furtherance of the conspiracy.

Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed and that a defendant was one of the members, then the statements thereafter knowingly made and the acts thereafter knowingly done, as well as the other prior acts and statements which I have already mentioned, by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found to have

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2 been a member even though the statements and acts may have
3 occurred in the absence and without the knowledge of the
4 defendant, provided such statements and acts were knowingly
5 made and done during the continuance of such conspiracy
6 and in furtherance of some object or purpose of the con-
7 spiracy.

8 In this regard you will recall that the Govern-
9 ment elicited or attempted to elicit certain testimony from
10 the defendant Yuk Choi Chung or David Chan as to statements
11 made by David Chan to Agent Gartland after David Chan's
12 arrest. You will further recall that I directed you, and
13 am now again directing you, to disregard any such statements
14 in considering the guilt or innocence of any other co-
15 conspirator, since upon his arrest David Chan ceased to be
16 a member of the alleged conspiracy and could not bind his
17 former co-conspirators by such post-arrest statements.

18 Furthermore, you may not consider such statements
19 in determining the guilt or innocence of David Chan since
20 no proper foundation was laid for such questions.

21 And again I remind you that David Chan was within
22 his rights in refusing to answer certain of these questions
23 and that no inference can be drawn against him by reason of
24 such refusal.

25 One final word on this subject. It's up to you

1
2 to determine the point in time when you find the conspiracy,
3 if one in fact existed, commenced. Once you find a con-
4 spiracy to have commenced, then the rules I just set forth
5 regarding liability for the acts and statements of fellow
6 conspirators come into play.

7 However, if you should find that the conspiracy,
8 if one existed, commenced at some later point in time, then
9 evidence of what a person may have done prior to the com-
10 mencement of the conspiracy is not binding on anyone else.
11 For example, if you should find that the conspiracy com-
12 menced after the January 30th sale, then evidence that the
13 defendant Lam Lek Chong, also known as Jimmy Lam, partici-
14 pated in the sale is not to be considered by you against
15 either of the other two defendants.

16 In this regard, any evidence of acts done prior
17 to the commencement of any conspiracy are to be considered
18 by you only on the question of intent and may not be con-
19 sidered any proof of the act charged in the indictment,
20 that is to say, evidence that a defendant may have committed
21 an earlier act of a like nature may not be considered by
22 the jury in determining whether the accused committed the
23 act charged in the indictment, nor may evidence of any
24 alleged earlier act of a like nature be considered for any
25 purpose whatever, unless the jury first finds that the other

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2 evidence in the case, standing alone, establishes beyond a
3 reasonable doubt that the accused did the particular act
4 charged in the particular count of the indictment then under
5 deliberation.

6 (Continued on page 1771.)

2 If the jury should find beyond a reasonable doubt
3 from other evidence in the case that the accused did the
4 act charged in the particular count in the indictment, the
5 jury may consider evidence as to an alleged earlier act of
6 a like nature, in determining the state of mind or intent
7 with which the accused did the act charged in the particular
8 count. And where proof of an alleged earlier act of a like
9 nature is established by evidence which is clear and con-
10 clusive, the jury may but is not obliged, to draw the infer-
11 ence and find that in doing the act charged in the particular
12 act under deliberation, the accused acted willfully and
13 with specific intent, and not because of mistake or acci-
14 dent or other innocent reason.

15 Now we come to the third element of the crime of
16 conspiracy, that is, the object of the conspiracy. If you
17 find that a conspiracy did exist and that the defendant
18 under consideration was a member of the conspiracy, you
19 must next consider whether the Government has proven be-
20 yond a reasonable doubt that the object of the conspiracy
21 was to import or to distribute or to possess with intent
22 to distribute a Schedule I controlled substance.

23 I've already instructed you that as a matter of
24 law heroin is a Schedule I controlled substance.

25 Now, importation is defined as any bringing in or

introduction of an article - in this case, heroin - into any area of the United States.

In a little while I will instruct you in detail as to the definitions of distribution and possession with intent to distribute. Let me just say for now that "distribution" means the transfer or the attempted transfer of a thing, and that "possession" means to have something in your control.

Now we come to the fourth and final element of the crime of conspiracy which you must consider - assuming that you have found beyond a reasonable doubt the prior three elements that I mentioned. This is the requirement of an overt act. You may not find any of the defendants guilty of the crime of conspiracy unless and until you are convinced beyond a reasonable doubt that at least one overt act was committed by at least one of the conspirators.

An overt act is any act knowingly committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature, if considered separately and apart from the conspiracy. It may be an innocent as the act of a man walking across the street or using the telephone. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme, and must be

1 knowingly done in furtherance of some object or purpose of
2 the conspiracy charged in the indictment.

3 An act is done "knowingly" if it is done volun-
4 tarily and intentionally, and not because of mistake or
5 accident or other innocent purpose.

6 Now, it is not necessary for the Government to
7 prove that each member of the conspiracy committed or par-
8 ticipated in the particular overt acts, since the acts of
9 any one done in the furtherance of the conspiracy become
10 the acts of all the other members. Also, the Government
11 is not required to prove each of the overt acts alleged.
12 It is sufficient if it proves the commission of at least
13 one of the acts at or about the time alleged.

14 I will now read you the overt acts which are
15 charged in the indictment, and the Government must prove
16 that at least one of these overt acts was committed in
17 furtherance of the conspiracy.

18 So it is charged that in pursuance of the said
19 conspiracy and to effect the objects thereof, the following
20 overt acts were committed in the Southern District of New
21 York and elsewhere:

22 (1) On or about February 14, 1974, defendant
23 Lam Lek Chong, also known as Jimmy Lam, had a meeting with
24 two other persons at the New York Hilton Hotel, 1335 Avenue
25

of the Americas, Manhattan, and negotiated for the importation and sale of heroin from Hong Kong.

(2) On or about March 12, 1974, defendant Lam Lek Chong, also known as Jimmy Lam, introduced the defendant Yuk Choi Chung, also known as David Chan, to two other persons at the City Squire Motor Inn, 790 Seventh Avenue, Manhattan, and discussed with them the matter of importing heroin into the United States from Hong Kong.

Incidentally, let me state in this regard that both the New York Hilton Hotel and the City Squire Motor Inn are in the Southern District of New York.

(3) During March and April, 1974, the defendants Lam Lek Chong, also known as Jimmy Lam, Yuk Choi Chung, also known as David Chan, and Francisco Li traveled from New York City to Hong Kong.

(4) On or about April 21, 1974, defendant Lam Lek Chong, also known as Jimmy Lam, delivered a sample of heroin to two persons at the Hyatt Regency Hotel in Hong Kong.

(5) On or about April 22, 1974, defendants Lam Lek Chong, also known as Jimmy Lam, and Francisco Li Ganoza went to the Hyatt Regency Hotel in Hong Kong and made arrangements to deliver heroin.

Now, the defendants, or certain of the defendants,

1
2 have raised certain defenses. They allege that they with-
3 drew from the conspiracy. They also allege that they were
4 entrapped into the unlawful activity by law enforcement
5 authorities.

6 Now, for a conspirator to withdraw from a con-
7 spiracy there must be affirmative action - either the
8 making of a clean breast to the authorities or communica-
9 tion of the abandonment in a manner reasonably calculated
10 to reach co-conspirators. Mere cessation of activity is
11 not enough. And the burden of establishing withdrawal lies
12 on the particular defendant asserting it.

13 Coming to the matter of entrapment, the defendants
14 assert that they were victims of entrapment as to the crime
15 charged in the indictment.

16 Now, where a person was no previous intent or
17 purpose to violate the law, but is induced or persuaded by
18 law enforcement officers or their agents to commit a
19 crime, he is a victim of entrapment, and the law as a
20 matter of policy forbids his conviction in such a case.

21 On the other hand, where a person already has
22 the readiness and willingness to break the law, the mere
23 fact that Government agents provide what appears to be a
24 favorable opportunity is not entrapment. For example, when
25 the Government suspects that a person is engaged in the

illicit sale of narcotics, it is not entrapment for a Government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from such suspected person.

If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the particular defendant they are considering was ready and willing to commit crimes such as charged in the indictment, whenever opportunity was afforded, and that the Government officers or their agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.

On the other hand, if the evidence in the case should leave you with a reasonable doubt as to whether the defendant had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the Government, then it is your duty to find them not guilty.

Now summing up Count 1, the conspiracy count:

In order for you to return a verdict of guilty against any of these defendants on the crime of conspiracy charged in Count 1, you must first find as to the particular defendant under consideration each of the following four

elements to have been proven by the Government beyond a reasonable doubt:

First: The existence of the conspiracy charged in the indictment;

Second: That as to each defendant under consideration, he willfully became a participant in the conspiracy;

Third: That it was an object of this conspiracy to import or to distribute or to possess with intent to distribute heroin; and

Fourth: That at least one of the conspirators knowingly committed an overt act during the period of the conspiracy and in furtherance thereof.

If, and only if, you are satisfied that the Government has proven the existence of each of these elements beyond a reasonable doubt will you return a verdict of guilty as to the defendant under consideration. Should you not be satisfied that the Government has sustained its burden of proof as to the particular defendant under consideration, then you must return a verdict of acquittal for that defendant as to Count 1.

We now come to the second count of the indictment which charges the defendant Francisco Li Ganoza with unlawfully, intentionally and knowingly distributing and

possessing with intent to distribute a Schedule I narcotic drug controlled substance, namely, heroin.

Now, in order for you to find the defendant Francisco Li Ganoza guilty of the crime charged in Count 2 of the indictment, you must be satisfied that the Government has proven beyond a reasonable doubt each of the following three elements:

First: That on or about May 30, 1974, Francisco Li Ganoza did distribute or possess with intent to distribute a Schedule I narcotic drug controlled substance;

Second: That he did so unlawfully, intentionally and knowingly, and

Third: That the object which the defendant distributor possessed with intent to distribute was, in fact, a narcotic drug controlled substance.

As to the first element, the Government must prove to you beyond a reasonable doubt that the defendant, Francisco Li Ganoza, did distribute, or possess with intent to distribute a narcotic drug controlled substance.

The term "distribute" means to deliver a controlled substance to the possession of another person, which, in turn, means the actual, constructive or attempted transfer of a controlled substance.

Now, possession may be actual, physical possession

or constructive possession. A person who knowingly has direct, physical possession over a thing at a given time is then in actual possession of it. Constructive possession exists even though a thing is not in the actual, physical possession of a person when the person has dominion and control over that thing. Dominion and control means the right to claim the thing and eventually dictate the movement and disposition of it.

For example, some of you may have been to a restaurant and checked your hat and coat with a doorman or coat check girl as you went in. You may have left your gloves in the pocket of your coat. You may have been given a ticket with which to claim your coat when you left the restaurant. Even though it's in the actual custody of the coat check girl, the coat is still yours and the gloves inside the pocket are still yours, and you have a ticket with which to claim the coat and gloves when you left.

Therefore, in this example, you have constructive possession of the coat and gloves even though they are not at your table. In short, it is not necessary for the Government to prove that the defendant had actual, physical possession of the heroin. Proof of constructive possession is sufficient.

Now, the law also recognizes that possession may

be sole or joint. If one person alone has actual or constructive possession of a substance, then possession is sole. If you find from the evidence beyond a reasonable doubt that the defendant Li Ganoza either alone or jointly with others had actual or constructive possession of the heroin described in the indictment, then you may find that such heroin was in the possession of the accused Li Ganoza within the meaning of the word "possession" as used in these instructions.

Also with regard to the first element of Count 2, in addition to finding possession you must also find beyond a reasonable doubt that at the time of the possession the defendant Li Ganoza had the intent in his mind to distribute heroin. I instruct you as a matter of law that the term "distribute" means to deliver a substance. "Intent" exists only in the mind.

Since it is not possible to look at a person's mind to see what went on, the only way you have of arriving at a decision on this question is to take into consideration all the facts and circumstances, including the exhibits, and determine whether the requisite intent was present at the time in question. Direct proof is unnecessary.

Intent may be inferred from all the circumstances.

1 In this regard, the Government contends that the
2
3 heroin allegedly in the defendant's possession was for
4 distribution and delivery and not for the personal use of
5 the defendant.

6 If you find beyond a reasonable doubt that the
7 defendant Li Ganoza possessed heroin, then you may, but
8 you are not required to, infer that his possession was
9 with intent to distribute.

10 Now, the second element of the offense charged
11 requires that you find beyond a reasonable doubt that the
12 defendant unlawfully, intentionally and knowingly committed
13 the crime with which he is charged.

14 "Unlawfully" means contrary to law. So to do an
15 act unlawfully means to do willfully something which is
16 contrary to law.

17 An act is done "knowingly" if it is done volun-
18 tarily and intentionally and not because of mistake, acci-
19 dent or other innocent reason.

20 You need not find, however, that the defendant
21 knew he was violating any particular statute. It is
22 sufficient if you are convinced beyond a reasonable doubt
23 that the defendant was generally aware of the unlawful
24 nature of his conduct.

25 Since I have already discussed intent there is

no further need to instruct you on that issue.

Now as to the third element, the indictment charges that the Schedule I narcotic drug controlled substance is heroin. As I have already instructed you, heroin is, as a matter of law, a Schedule I narcotic drug controlled substance. You must, however, still find that the substance in Government's Exhibit 36 is heroin, and in this regard you may consider the stipulation between the parties concerning the chemical analysis of the substance. This stipulation was read to you earlier in the course of the trial.

Now, in conjunction with its allegation on Count 2, the Government has charged that the defendant, Francisco Li Ganoza, aided and abetted the commission of the crime charged in Count 2.

Now the guilt of a defendant may be established without proof that the accused personally did every act constituting the offense charged.

In order to aid and abet another to commit a crime, it is necessary that the accused willfully associated himself in some way with the criminal venture, and willfully participated in it as he would in something he wishes to bring about; that is to say, that he willfully seek by some act or omission of his to make the criminal venture

succeed.

In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something which the law requires to be done; that is to say - and I repeat - with bad purpose either to disobey or to disregard the law.

You, of course, may not find a defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant participated in its commission.

Now summarizing Count 2:

In order for you to return a verdict of guilty as to the defendant Francisco Li Ganoza of the crime charged in Count 2 of the indictment, you must be satisfied that the Government has proven each of the following elements beyond a reasonable doubt:

First: That the defendant did distribute or possess with intent to distribute a Schedule I narcotic drug controlled substance;

Second: That he did so unlawfully, intentionally

and knowingly, and

Third: That the object which the defendant distributed or possessed with intent to distribute was, in fact, a narcotic drug controlled substance.

If, and only if, you are satisfied that the Government has proven the existence of each of these elements beyond a reasonable doubt will you return a verdict of guilty. Should you not be satisfied that the Government has sustained its burden of proving each element beyond a reasonable doubt, then you must return a verdict of acquittal.

Now throughout these instructions I have used the term "reasonable doubt." What is a reasonable doubt?

A reasonable doubt is one which appears to your reason, your judgment, your common sense, and your experience. It is not impulse, whim or speculation. It is not an excuse to avoid the performance of the unpleasant duty, nor sympathy for the defendant.

On the contrary, it is a doubt which a reasonable person has after carefully weighing all the evidence.

A reasonable doubt may arise not only from the evidence presented but also from a lack of evidence. Since the burden is always upon the prosecution to prove the accused guilty of every essential element of the crime

charged beyond a reasonable doubt, a defendant has the right to rely upon the failure of the prosecution to establish such proof in order to create a reasonable doubt.

If, after a fair and impartial consideration of all the evidence in the case, or the lack of it, you can honestly say that you have such a doubt as would cause prudent person to hesitate before acting in matters of importance to themselves, then you have a reasonable doubt and, in that circumstance, it is your duty to acquit.

On the other hand, if after a fair and impartial consideration of all the evidence you can honestly say that you are satisfied of the guilt of the defendant, with such conviction that you would be willing to act upon it in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt, and in that circumstance it is your duty to convict.

One final word on this subject: "Beyond a reasonable doubt" does not mean beyond all possible doubt. If that were the rule, few persons, however guilty they might be, would be convicted. Consequently, the law in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt.


Now I want to explain that there are two types of evidence which a jury may properly rely on in deciding the

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2 guilt or innocence of an accused. One is direct evidence,
3 such as testimony of a witness relating to what he heard
4 or saw, something he knows of through his own knowledge
5 which bears directly on a fact issue in the case.

6 For example, testimony by a witness that he saw
7 a defendant in possession of an object is direct evidence
8 which, if believed by the jury, established the fact that
9 the defendant was in possession of the object.

10 The other type of evidence is circumstantial
11 evidence, which is proof of a fact or circumstance from
12 which one may infer connected facts which reasonably fol-
13 low in a person's common experience.

14 (Continued on next page.)
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Circumstantial evidence is that evidence which tends to prove a disputed fact through proof of other facts. To use a very simple example, if you look out of the window and see it raining then your statement that you see rain coming down is direct evidence that it is raining. If instead of looking out of the window you see a succession of people coming inside, each with raincoats, rubbers and umbrellas, everybody dripping wet, then your statement as to that observation is circumstantial evidence of the fact that it is raining.

Now, circumstantial evidence is of no less value than direct evidence, for as a general rule the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

Now, there are times when different inferences may be drawn from a certain set of facts. An inference is a deduction or conclusion which a jury is permitted to draw from facts which have been established by either the direct or circumstantial evidence introduced in the case.

An inference is not drawn by speculation or guesswork, but rather arrived at by an exercise of your reason and common sense. So while considering the evidence pre-

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2 sented you are permitted to draw from the facts which you
3 find to have been proven such reasonable inferences as seem
4 justified in the light of your experience. But here again
5 let me remind you that whether based on direct or circum-
6 stantial evidence or the logical, reasonable inferences
7 drawn from such evidence you must be satisfied of the guilt
8 of the defendant beyond a reasonable doubt.

9 Now, the attorneys in the case have entered into
10 several stipulations regarding a variety of matters. In
11 the first place, the stipulations are only binding on the
12 persons who agreed to them. Secondly, when the attorneys
13 stipulate or agree as to the existence of a fact you must,
14 unless otherwise instructed, accept the stipulation as
15 evidence and regard the fact as proved.

16 Now, I want to talk to you very briefly about the
17 credibility or believability of witnesses. I think I men-
18 tioned at the start of this rather lengthy instruction that
19 you are the sole judges of the credibility or truthfulness
20 of each witness in this case. In weighing the testimony
21 of each witness you should consider his relationship to the
22 Government or to the defendant, the extent of the witness'
23 interest, if any, in the outcome of the case, his manner
24 of testifying, his appearance and conduct while on the
25 stand, his intelligence, the strength or weakness of his

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recollection, and the extent to which he has been corroborated or contradicted, if at all, by the other credible evidence.

The ultimate question for you to decide in passing upon the credibility of a witness is did the witness tell the truth, and to this end you are to use your everyday common sense.

If you find that any witness has deliberately testified falsely to any material fact you may disregard all of the witness' testimony or you may accept that part of his testimony which you believe is truthful or which you find to be corroborated or supported by other evidence in the case.

You are further instructed that a witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something or has failed to say or do something which is inconsistent with that witness' present testimony.

If you believe that any witness has been impeached, and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you think it deserves.

Remember, however, that a previous out of Court statement introduced to impeach or discredit a witness is

not in itself to be considered by you as establishing the true facts.

I also wish to remind you that the mere fact that a witness is employed by the Government does not entitle his testimony to more weight or credence than that of any other witness. It is for you to judge the credibility of all witnesses and you should consider their interest, if any, in determining the weight to be given their testimony. Remember, it's the quality of the evidence that counts.

There also has been testimony here of the previous good character of the defendant Yuk Choi Chung. You should consider such evidence of character together with all the other facts and evidence in the case in determining the guilt or innocence of the defendant. Evidence of good character may in itself create a reasonable doubt where without such evidence no reasonable doubt would have existed. But if from all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty a showing that he previously had enjoyed a reputation of good character does not justify or excuse the offense and you should not acquit a defendant merely because you believe he is a person of good repute.

Now, the law permits, but does not require, a defendant to take the stand and testify in his own behalf.

1 The defendant Yuk Choi Chung has taken the stand in this
2 case. He has the right to do so and did so voluntarily.
3 If he had not taken the stand you could have drawn no in-
4 ference against him from his failure to do so, but having
5 chosen to testify you judge his credibility by the same
6 standards by which you judge every other witness' credi-
7 bility.
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9 It is proper, of course, to note the deep per-
10 sonal interest which every defendant has in the result of
11 the action against him. That may be considered by the
12 jury in weighing his testimony and in determining how far
13 and to what extent it is worthy of belief. However, it
14 by no means follows that simply because a person has a
15 vital interest in the end result that he is not capable
16 of telling a truthful, candid and straightforward story.
17 It's for you to decide to what extent, if at all, his in-
18 terest has affected or colored his testimony.

19 On the other hand, the defendants Lam Lek Chong
20 and Francisco Li Ganoza have not testified in this case.
21 This is their absolute right. They are not required to do
22 so. As I have told you, a defendant does not have to prove
23 his innocence. The burden of proof is on the Government
24 to prove the guilt of a defendant beyond a reasonable
25 doubt and in no respect may such failure on the part of

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2 these defendants to testify be considered by you as any
3 evidence against either of these defendants or give rise
4 to any basis for any presumption or inference unfavorable
5 to either of them. You must not permit that fact to weigh
6 in the slightest against either of them, nor should it
7 enter into your deliberations and discussions.

8 Now, there are several general topics on which
9 I must say a few words of caution to you.

10 Initially there was a reference made to the many
11 tapes that the Government has in its possession. Any tape
12 which is not in evidence is, of course, not to be con-
13 sidered by you in any manner whatsoever. By this I mean
14 that you are to draw no inference that the tapes either
15 did or did not contain any evidence in this case. You are
16 to consider only that material which is in evidence and
17 the testimony heard by you in Court. I would ask that you
18 do your best to just forget that this statement was ever
19 made.

20 There was also an unfortunate statement made to
21 the effect that one of the defendants could have been but
22 was not indicted on Count 2. I am sure all of you know
23 from what you have seen and from my initial remarks that
24 the indictment is only an accusatory device and is no indi-
25 cation of guilt, that the fact that someone is not indicted

1 means absolutely nothing. Whether persons who may be in-
2 volved with others in alleged criminal conduct should be
3 indicted is a matter within the sole discretion of the
4 United States Attorney and the grand jury. It should be
5 obvious, therefore, as a matter of logic, that the fact
6 that someone is or is not indicted has no connection with
7 the guilt or innocence of that person on the indictment
8 which is before you.

9
10 Thus, you may draw no inference favorable or un-
11 favorable either to the Government or to the defense by
12 reason of the fact that a person was not indicted on a
13 particular count.

14 I might repeat again what you were told at the
15 time you were selected as jurors regarding the legality of
16 wire recordings. The evidence shows that when the agents
17 met with the defendants they were equipped with certain
18 recording devices. I am instructing you again, as I did
19 when you were selected, that the use of these devices in
20 the manner described in this case is entirely within the
21 law and violates no one's rights. This is so essentially
22 because the agents who were participants in the conversa-
23 tions consented to have them recorded and the agents could
24 and did testify to much of the contents of these conver-
25 sations. Accordingly, the use of these devices was a

proper investigative technique.

I again remind you, as I have so frequently in this case, that it is your recollection of what you heard on the tapes which governs. The transcripts you were supplied with were merely to be of some assistance to you if it was necessary. If there was any discrepancy between what you heard on the tape and what appeared on the transcript your recollection of what you heard, of course, governs.

As I mentioned earlier in my remarks to you, anything that counsel either for the Government or for the defense may have said with respect to matters in evidence, whether during the trial, in argument or in summation, is not evidence in the case.

So too anything the Court might have said during the trial or during the course of these instructions is not evidence.

This case must be decided by you solely on the basis of the sworn testimony of the witnesses and such exhibits as were received in evidence.

Now, the actions of the Court during the trial in ruling on motions or objections are not to be taken by you as any indication of the guilt or innocence of any defendant. These are matters of procedure and law, with

1 which you have no concern. I have attempted to avoid any
2 comment which might suggest my personal view on the evi-
3 dence or on the credibility of witnesses or inferences to
4 be drawn or the importance of one part of the testimony as
5 compared with another and no comment by me has been so
6 intended.
7

8 From time to time conferences at the bench out
9 of your hearing were conducted at the request of the attor-
10 neys for the Government and for the defense and frequently
11 at the request of the Court. These were conferences solely
12 on questions of law, which it is my duty to decide. You
13 are not to draw any inferences against either side to this
14 controversy for requesting such conferences, because an
15 attorney would be remiss in his duty to his client if he
16 did not protect his interests in the manner provided by
17 law, which it is my function to decide.

18 Let me point out that the duty of imposing sen-
19 tence in the event of a guilty verdict rests exclusively
20 with the Court. The punishment which may be inflicted upon
21 a defendant must never be considered by you in any way in
22 arriving at an impartial verdict as to the guilt or inno-
23 cence of the accused.

24 Now, you are about to commence your deliberations.
25 Of course, the purpose of your deliberations is to exchange

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2 views with your fellow jurors, to discuss and consider the
3 evidence, to listen to each other's arguments, to present
4 your own views, and to reach a unanimous verdict based
5 solely and wholly on the evidence, if you can do so without
6 violence to your own individual judgment. Each of you must
7 decide the case for yourself, but do so only after an im-
8 partial consideration of the evidence in the case with your
9 fellow jurors.

10 Do not hesitate to reexamine your views and to
11 change your opinion when, after discussion, it appears to
12 be in error. But if after carefully considering all of
13 the evidence in the case and the arguments of your fellow
14 jurors you hold a conscientious view which differs from
15 the others, you are not to yield your view simply because
16 you are outnumbered. Your final vote must reflect your
17 objective and conscientious determination of the issues.

18 Now, if in the course of your deliberations you
19 need to examine any of the exhibits or desire any of the
20 testimony to be read or any portions of the tapes to be
21 played or find that you are uncertain as to the meaning of
22 any part of the Court's instructions you may send a note
23 to the Court through your forelady asking for whatever will
24 clear up any of the questions you may have. In communicat-
25 ing with the Court, however, I should admonish you that *

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2 you should not indicate how your vote may then be divided
3 with respect to any count or with respect to any defendant.

4 Your oath sums up your duty, and that is without
5 fear or favor to anyone you will well and truly try the
6 issues between these defendants and the Government of the
7 United States based solely upon the evidence and the Court's
8 instructions as to the law. It's important to the Govern-
9 ment and it's important to the defendants.

10 Will counsel approach the side bar. We can go
11 in the robing room.

12 (In the robing room.)

13 THE COURT: Any exceptions?

14 MR. CORRIERO: I have one, your Honor, to that
15 portion of your Honor's charge I believe in reference to
16 a description of the second element.

17 THE COURT: In which count?

18 MR. CORRIERO: Of the conspiracy count, the first
19 count. I believe your Honor indicated that if the jury
20 concluded that there was an agreement and the agreement
21 had as its purpose or end an illegal purpose they can con-
22 clude that particular element was met.

23 I would request that the Court indicate to the
24 jury that it is not any illegal purpose that may have been
25 the subject of a conspiracy, that in respect of this indict-

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2 ment--

3 THE COURT: But I spelled it out. This was just
4 summing up in brief. Then when I came to each individual
5 element I spelled out precisely what they had to find be-
6 yond a reasonable doubt. That is what I am sure you will
7 agree would be the subject of a conspiracy and was the
8 implication, heroin. That was all spelled out. That was
9 merely the chapter heading that I was giving.

10 MR. CORRIERO: Will your Honor consider instruct-
11 ing the jury that if they conclude based on all the facts
12 that the intention of the defendants was in reality to de-
13 fraud the undercover agents--

14 THE COURT: Listen, I put in a lot of stuff at
15 your request, including entrapment, and if that is your
16 defense, entrapment, how can you also say that what they
17 were really doing was trying to entrap the agents.

18 MR. CORRIERO: I believe I can have inconsistent
19 defenses.

20 THE COURT: Yes, but you won't get me charging
21 them.

22 MR. CORRIERO: All right.

23 MR. ROSENTHAL: I respectfully except to that
24 portion of your Honor's charge practically in the beginning
25 of the charge in which you said that the conspiracy was to

import heroin and the distribution and possession to distribute heroin in the United States.

As I recall the indictment, it reverts back to the heroin that they were conspiring to import and the indictment specifically says "said heroin," so that it is not a general charge of a conspiracy to possess and distribute heroin in the United States.

THE COURT: All right. Anything else? I think I have explained that to you earlier in one of our meetings.

MR. ROSENTHAL: I know. However, I believe that I should take exception to it, and I do respectfully do so.

THE COURT: Yes.

MR. ROSENTHAL: I do take exception to your Honor's charging, as requested by the Government in their supplemental charge, on the question of withdrawal from the conspiracy. There has been no request made by the defendant Chung for such a charge.

THE COURT: It mystified me a little why the Government wanted the particular charge, frankly, because it didn't enter into the case. But since I had gone into the matter of how you join a conspiracy I don't know that there is anything wrong with putting in how you get out of it.

2 MR. ROSENTHAL: I submit, your Honor, it doesn't
3 mystify me and I think it's a very insidious request on the
4 part of the Government, because it implants in the minds
5 of the jury that the defendant Chung is conceding that he
6 entered the conspiracy and then there came a time when he
7 withdrew therefrom.

8 THE COURT: No, no. I have noted your exception.
9 My only statement is I think that is rather far-fetched.

10 MR. TIMBERS: Your Honor, may I just say for
11 the record on that point that it's the Government's posi-
12 tion that the reason the charge should be given is that Mr.
13 Rosenthal asked both the undercover agents, "Did you see
14 Mr. Chung after April 20th," and I think the jury could
15 infer from that that Mr. Rosenthal was suggesting that Mr.
16 Chung withdrew from the conspiracy at that point, and there-
17 fore I think the charge was appropriate.

18 MR. ROSENTHAL: It's equally consistent with the
19 position of the defendant Chung that he never entered into
20 the conspiracy to import and when he realized--

21 THE COURT: Just note your exceptions and save
22 your briefs for the Court of Appeals.

23 MR. ROSENTHAL: Right. One thing more, your
24 Honor. I hope I don't need it. I think this may have been
25 a slip of the tongue. At one point in the charge you said

2 the jury was to consider the guilt or innocence of each of
3 the defendants on both counts of the indictment.

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4 THE COURT: Individually.

5 MR. ROSENTHAL: Individually, but the first two
6 named defendants are not involved in the second count.

7 THE COURT: If the jury convicts him on the
8 second count I will set the conviction aside.

9 MR. FRANKEL: If it pleases your Honor, I don't
10 know if your Honor charged the jury is to draw no conclu-
11 sion on an inference upon an inference.

12 THE COURT: I didn't charge it, although it's
13 proper to charge an inference upon an inference.

14 MR. FRANKEL: Yes, that they are to draw no con-
15 clusion. I would ask your Honor to do that.

16 THE COURT: I was surprised about that. I didn't
17 charge it.

18 MR. FRANKEL: I am not so sure that I requested
19 it. I wish you would, your Honor.

20 THE COURT: Just as an educational observation,
21 it is all right to charge that. I didn't do it.

22 MR. FRANKEL: I would ask your Honor to do it.

23 THE COURT: That they can draw an inference upon
24 an inference?

25 MR. FRANKEL: That they cannot draw an inference

2 upon an inference.

3 MR. ROSENTHAL: The Judge just said the opposite.

4 THE COURT: No, no. I said they could draw in-
5 ferences. I didn't say they could draw an inference on an
6 inference, although that would have been all right, and it
7 would have been wrong for me to have charged that they could
8 not draw an inference on an inference.

9 MR. FRANKEL: I will say nothing further about it,
10 except to take an exception.

11 THE COURT: I was surprised myself.

12 MR. FRANKEL: I do object to the example your
13 Honor gave about the hat check girl. I take exception to
14 that charge and your Honor's ruling.

15 There were other requests.

16 THE COURT: So far as a failure to charge what
17 you had requested, you already made your record on that.

18 MR. FRANKEL: All right. 17, 18, 22, 23, 24, 25.

19 THE COURT: Whatever the record was--

20 MR. FRANKEL: And 28.

21 MR. ROSENTHAL: Will your Honor mark the requests
22 of the various defendants as exhibits.

23 THE COURT: Yes.

24 MR. TIMBERS: Your Honor, the Government has
25 several points.

One, with all respect and courtesy, I became a little bit confused on the instruction on the second count, the first element of the offense, distribution or possession with an intent to distribute. The Government would simply ask that the jury be instructed that the Government can prove in the alternative either distribution or possession with an intent to distribute and that the Government contends that it has proved distribution against Francisco Li Ganoza either by circumstantial evidence or by aiding and abetting or, alternatively, possession--

THE COURT: It's embodied in there, except that I don't say what you contend. I am not going to repeat your charge or your summation.

MR. TIMBERS: My point is I became a little bit confused at that point.

The other point I would like to make is I object on behalf of the Government to the giving of the entrapment charge. I don't believe any elements specified in United States versus Alsandra have been met here.

(Continued on page 1804.)

THE COURT: It was a very gray area so far as I was concerned. I don't know how far the circuit is going, but they have gone quite far in requiring a charge as a cautionary matter.

MR. TIMBERS: Let me just say that I don't believe there is any evidence of inducement in this case. I think the uncontroverted evidence is that Jimmy Lam suggested the project initially.

THE COURT: I am not interested now in an analysis of the case; I am interested in getting back to the jurors who are sitting out there.

MR. TIMBERS: Two quick final points:

I object to the specific language of the intent charge. I believe it is misleading that you can find--I am sorry, I mean the similar act charge. I think the language used is misleading to say that the jury must find that the act was done first before you can consider any similar acts on the point.

Clearly, similar act testimony was admissible on the grounds other than intent, such as habit or custom or design, tending to show that Jimmy Lam did the things charged here.

THE COURT: Is that all?

MR. TIMBERS: And my final point is that I object

to all of the instructions that were given with regard to the questions I asked at the end of the cross examination of Yuk Choi Chung. I don't believe he has a privilege based on an informant's privilege not to answer the questions.

I think that anything he says about other defendants is admissible in evidence against those defendants. It just is not admissible as under an agency theory.

Those are my objections.

(End of robing room discussion.)

THE COURT: Now, Mr. Burghardt and Mr. Rosenthal, I am afraid we have to let you go now, but I want to express my very deep thanks to you. We can only have 12 in the jury room, and it has been very pleasant having both of you these past weeks.

JUROR BURGHARDT: Thank you very, your Honor. I consider it a duty and a privilege.

THE COURT: Swear the marshal, please.

(Marshal sworn at 12:10 a.m.)

THE COURT: Would you like to eat indoors? It is raining out and you can order some food sent in to you.

THE FORELADY: I think so, yes.

(Whereupon, the jury retired to commence deliberating upon a verdict.)

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2 THE COURT: Now if they ask for the transcripts
3 I am going to tell them to identify what portion they would
4 like to hear of the tape, and if they can't do that I will
5 send in a copy of the particular transcript, one copy for
6 the Forelady to mark off and look through it and mark off
7 that area that contains the subject matter they want.

8 MR. TIMBERS: Your Honor, may I just say that it
9 is the Government's position that the transcripts are in
10 evidence; they are admissible as aid memoirs, and that the
11 jury should be permitted to examine the transcripts. I
12 believe I can produce a case that they are admissible as
13 aid memoirs.

14 THE COURT: Well, the transcripts of the telephone
15 conversations I would permit them to have because in my
16 opinion they were 99-9/10 per cent accurate. I couldn't
17 say the same for the transcript of the tape.

18 MR. FRANKEL: May I point out, your Honor, that
19 one transcript bears the name of my client, Francisco, and
20 there is no testimony that that was his voice anywhere.
21 So that should go in--

22 THE COURT: I don't know if that is so.

23 MR. FRANKEL: --that name should be stricken out
24 and "voice" substituted.

25 THE COURT: No. There has been testimony that

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it was Francisco.

MR. FRANKEL: You mean when one detective was called back.

I asked him: Did you ever talk to Francisco face to face? And he said, "I spoke to him another time," meaning that phone call.

THE COURT: All right.

MR. ROSENTHAL: May it appear upon the record, Judge, that I have delivered to the Clerk, Mr. Johnson, the exhibits offered into evidence by the defendant Yuk Choi Chung, and if the jury sends for them the defendant consents that they go into the jury room.

THE COURT: Consent to what?

MR. ROSENTHAL: I say if the jury sends for any of the exhibits that have been offered into evidence, we consent that they be delivered to them.

THE COURT: Actually they are entitled to any of the exhibits, and my ruling on the other is that the transcripts were received in evidence but solely to help with the tapes. The tape is the final evidence, and with all respect to the Government I have a little control over a trial and I want to see that it is conducted fairly, and I think the tapes are the fairest evidence.

MR. CORRIERO: Excuse me, your Honor, about the

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scheduling of that hearing: When did your Honor wish to do it?

THE COURT: Why don't we do it this afternoon?

MR. TIMBERS: Your Honor, could we delineate what the issues will be this afternoon so I can call the proper witnesses?

MR. CORRIERO: We will do that this afternoon.

THE COURT: That the defendant Chung was interrogated after his arrest and over the objection of his counsel when he had counsel representing him.

MR. FRANKEL: And I will now give Mr. Johnson my exhibits for the file.

(Recess pending jury deliberation.)

(Continued on page 1809.)

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AFTERNOON SESSION

2:00 p.m.

(In the robing room.)

THE COURT: We have received a note from the jury,
at 1:00 p.m., reading as follows:

"Judge, your Honor - conspiracy, four points.

"Li Ganoza - marriage certificate.

"David Chan - tickets.

"All DEA 6 in evidence. Two paragraphs in dispute, seven and eight.

"April 9th tape.

"Both tapes at which David Chan participated."

He participated in both.

MR. ROSENTHAL: Three and four.

MR. TIMBERS: Three and four.

THE COURT: We will be here a long time.

MR. CORRIERO: I understand your Honor intends
to give the entire DEA 6 to the jury?

THE COURT: Yes.

MR. CORRIERO: I would just except to that. My
interpretation would be just the paragraphs enumerated.

THE COURT: That's what they ask for. If they
don't want the rest of it they don't have to look at it.

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2 The whole thing is an exhibit, and I don't see how you can
3 just cut it out of the exhibit.

4 So I will send the whole thing in.

5 MR. TIMBERS: Your Honor, just for the record let
6 me say this. My interpretation is that they have asked
7 for the whole DEA 6, and they attempted to specify what it
8 is by saying--

9 THE COURT: However you want to interpret it, the
10 whole thing is going in.

11 MR. ROSENTHAL: Judge, I have a request that in
12 respect to the tickets of my client, one of the China Air-
13 lines is not legible as to the date of issuance, and the
14 only thing that may be admissible was the passport, which
15 I think is Exhibit K. I ask that that go in with it.

16 THE COURT: Well, they have asked for those tickets.
17 If they want the passport I guess they will ask for it.

18 I think I will ask them if there are any particu-
19 lar parts of these tapes that they are interested in, and
20 I will send in one copy of the transcript of each tape and
21 ask the Forelady to mark in some fashion those portions,
22 and we may eliminate a great deal. Otherwise we would not
23 finish listening to them this afternoon and we have to go
24 over until tomorrow.

25 So if I can get a couple of transcripts--

MR. CORRIERO: Would your Honor also send the transcript of the April 9th conversation?

THE COURT: I am going to play the tape in Court and I am going to play these tapes in Court, but in order to save time I'm going to do this: You know, the situation arises when jurors say, "We want to hear the testimony of so and so," and when you read the testimony of so and so there might be just one little tiny part they are interested in.

So since the transcripts are in evidence I will utilize them to that extent and permit them to mark the parts, and then we can find it for them.

MR. ROSENTHAL: Well, I most respectfully except to your Honor's ruling.

THE COURT: Actually I could give them the transcripts.

MR. ROSENTHAL: I know your Honor admitted them, but with the understanding--

THE COURT: Yes, they are still subject to that limitation. I am just trying to save us from sitting and listening to these tapes for four or five hours when there may be only certain portions that they are interested in.

MR. TIMBERS: Your Honor, I will give the Fore-lady the actual exhibits. I don't see why the jury can't

mark up the actual exhibits, the transcripts.

THE COURT: That's all right.

MR. TIMBERS: One additional point:

Agent Gartland is here for the hearing this
afternoon--

THE COURT: I think we are not going to be able
to do it today.

MR. TIMBERS: I will ask him to stay on call.

THE COURT: Yes, and you will need David Chan too.

MR. ROSENTHAL: David Chan, and I have a witness
also that is on call.

THE COURT: All right, we can do it either today
or tomorrow.

MR. ROSENTHAL: Yes. There is no State Court
tomorrow. So I will be available.

THE COURT: I will tell them if they could go
through the transcripts and indicate what portions of the
tape they want played, we will play them.

MR. FRANKEL: Will the request to charge be
marked as exhibits by the Court?

THE CLERK: Yes. I am going to give the numbers
to the Court Reporter to note in the record.

(Request to charge marked Court's Exhibits 1, 2,
3, 4, 5.)

(Jury's note marked Court's Exhibit 6.)

(End of robing room discussion.)

(In the courtroom in the presence of the jury.)

THE COURT: We are going to play the April 9th tape first, and I believe that you have received some of the exhibits. You have received Li Ganoza's marriage certificate and David Chan's tickets, and I am sending in the DEA 6 that had those two paragraphs, and I will charge you before you go back.

I assume you just want the four elements of the conspiracy, what those four points are?

THE FORELADY: Yes. There are some jurors who are not quite clear on it.

THE COURT: Now, both tapes in which David Chan participated, those tapes will take about, you will remember, four or five hours to play, and I was wondering whether there may be particular parts of it you are interested in, and if I were to give you one copy of the transcript of those tapes, whether you could look that over and see what portions you wanted.

THE FORELADY: I'm pretty sure we could.

THE COURT: Otherwise I'm sure you will be listening to a lot of the same stuff that you have listened to before, which may not be relevant to any questions you have

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2 in mind.

3 THE FORELADY: Yes.

4 THE COURT: So if that's agreeable to you, that
5 is what we will do with respect to the tapes in which David
6 Chan participated.

7 Now we will play the April 9th tape.

8 Do we have the transcripts so that they can
9 follow?

10 Do you want the transcripts to follow this?

11 JURORS: No. We can hear it.

12 MR. TIMBERS: I will play it right now.

13 (Defendant Lam's Exhibit B played back to Court
14 and jury.)

15 THE COURT: I will have to send you back to the
16 jury room now, and I will also give you Government's Ex-
17 hibits 3B and 4B, and you can mark them with a pencil
18 indicating what portions you want.

19 I know you haven't gotten your lunch yet, I'm
20 sorry, but it should be here shortly. I won't interrupt
21 your lunch if it comes, but otherwise I will bring you
22 back just to read you those four points.

23 THE FORELADY: There was one other question. I
24 will put it in an envelope.

25 THE COURT: All right.

(The jury left the courtroom.)

THE COURT: We have another note. The jury wants the tapes where Li Ganoza name appears, and that was, I believe, a telephone call.

MR. TIMBERS: They want to hear those tapes?

THE COURT: "All tapes where Li Ganoza was present."

Well, he wasn't present at any tapes.

MR. TIMBERS: I think technically at least he is present when he is talking on the other end of the telephone.

MR. FRANKEL: They are not asking for that. I think that should be clarified.

THE COURT: I will ask them. So I suggest you get those out.

MR. TIMBERS: I will, your Honor.

(Recess.)

(Continued on page 1816.)

(3:30 p.m. - jury present.)

THE COURT: I don't know quite how much you want me to read, but I will be glad to read--

THE FORELADY: Judge, your Honor, the jurors are confused about the four points that represent conspiracy. It's just the first four points.

THE COURT: All right. I will say again what I said this morning.

Now we come to the crime charged in Count 1 of the indictment. In order to convict Lam Lek Chong, also known as Jimmy Lam, Yuk Choi Chung, also known as David Chan, or Francisco Li Ganoza of the conspiracy charged in Count 1 the Government must establish beyond a reasonable doubt each of the following four elements against each of the defendants charged:

First, the existence of the conspiracy charged in the indictment.

Second, that the particular defendant whose guilt or innocence you are considering willfully became a participant in the conspiracy.

Third, that it was a part of this conspiracy to import, to distribute or possess with intent to distribute a Schedule I controlled substance. In this regard I instruct you as a matter of law that heroin is such a substance.

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Fourth, that at least one of the conspirators knowingly committed an overt act during the period of the conspiracy alleged in the indictment.

Then you will remember that I read off the various overt acts.

Does that clear it up?

All right. When you get the transcripts marked up, the parts that you want weighed, let us know.

THE FORELADY: Yes. There is one other question. Just cite one overt act. One of the jurors is in doubt about that.

THE COURT: I will read all of them.

First, on or about February 14, 1974 defendant Lam Lek Chong, also known as Jimmy Lam, had a meeting with two other persons at the New York Hilton Hotel, 1335 Avenue of the Americas, Manhattan, and negotiated for the importation and sale of heroin from Hong Kong.

Second, on or about March 12, 1974 defendant Lam Lek Chong, also known as Jimmy Lam, introduced defendant Yuk Choi Chung, also known as David Chan, to two other persons at the City Squire Motor Inn, 790 Seventh Avenue, Manhattan, and discussed with them the manner of importing heroin into the United States from Hong Kong.

And I noted parenthetically at that time that

those two hotels were in the Southern District of New York.

Third, that during March and April 1974 defendants Lam Lek Chong, also known as Jimmy Lam, Yuk Choi Chung, also known as David Chan, and Francisco Li Ganoza traveled from New York City to Hong Kong.

Fourth, that on or about April 21, 1974, defendant Lam Lek Chong, also known as Jimmy Lam, delivered a sample of heroin to two persons at the Hyatt Regency Hotel in Hong Kong.

Fifth, that on or about April 22, 1974, the defendants Lam Lek Chong, also known as Jimmy Lam, and Francisco Li Ganoza went to the Hyatt Regency Hotel in Hong Kong and made arrangements to deliver heroin.

THE FORELADY: The last statement over again, the last date.

THE COURT: The fifth of the overt acts was on or about April 22, 1974 the defendants Lam Lek Chong, also known as Jimmy Lam, and Francisco Li Ganoza went to the Hyatt Regency Hotel in Hong Kong and made arrangements to deliver heroin.

(The jury left the courtroom.)

(3:27 - jury present.)

THE COURT: I apologize. There was one other note that I didn't respond to, namely, "All tapes where

Li Ganoza was present."

There are tapes where allegedly Mr. Li Ganoza is on the telephone, but I don't believe that there are any tapes, such as the other tapes in the hotels, where he was present, because, as I recall the evidence, there were no tapes taken in Hong Kong.

Do you want to hear the tapes where he was on the telephone? We will add those.

MR. TIMBERS: We had them ready, but perhaps, since the jury is going back to decide which one of the David Chan conversations it wants to hear--

JUROR NO. 2: Not David Chan.

MR. TIMBERS: I have the Li Ganoza tapes ready.

THE FORELADY: Just where he allegedly responded. We just want to hear--

MR. FRANKEL: Just those two parts apparently, your Honor.

THE COURT: On the telephone.

MR. FRANKEL: Yes.

MR. TIMBERS: The first one is a tape recording made on May 15, 1974. I will pass out the transcripts.

MR. FRANKEL: We don't need the transcripts, your Honor. That is what I objected to, your Honor, because the name is on the transcript. If they can hear it, let

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them hear it, sir.

I apologize for raising my voice.

THE FORELADY: We can hear it.

MR. TIMBERS: This is Government's Exhibit 28.

It's of a May 15, 1974 telephone conversation. Detective Wright is receiving a call from Jimmy Lam.

(Tape played.)

(Continued on page 1821.)

THE COURT: Let us know if there are any other tapes--

MR. FRANKEL: There is another tape with Francisco Li Ganoza they want to hear. He is alleged to be talking.

Does the jury want the whole tape?

THE COURT: I don't know.

MR. TIMBERS: Incidentally, I misspoke on that. It was Detective Wright placing that last call--

MR. FRANKEL: No, it was the other way around.

MR. TIMBERS: Okay, it speaks for itself.

THE COURT: Mr. Frankel, why don't you sit down and relax.

MR. FRANKEL: I'm sorry.

MR. TIMBERS: I'm about to play Government's Exhibit 35E, which is a recording of a telephone call made at 6:55 p.m. on May 29th. The two people speaking initially are Officer Mingo and Jimmy Lam.

(Government's Exhibit 35E played back to jury.)

(The jury returned to the jury room at 3:55 p.m. to resume deliberations.)

(4:45 p.m. - in the robing room.)

THE COURT: I have three more notes from the

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2 jury:

3 "Judge, your Honor, is a man legally responsible
4 for what may have been in his apartment when he is absent?
5 Does this constitute constructive possession?"

6 I will just charge them on constructive posses-
7 sion. That is the only thing I can do.

8 Then they want Li Ganoza's passport and reentry.

9 Then they want the testimony of Mingo and Wright
10 in the period during Hong Kong.

11 MR. FRANKEL: The whole testimony?

12 THE COURT: The testimony of Mingo and Wright
13 in the period in Hong Kong.

14 MR. CORRIERO: It is not limited to Li Ganoza,
15 that question?

16 THE COURT: It says: "The testimony of Mingo and
17 Wright in the period during Hong Kong."

18 MR. FRANKEL: The Forelady better clarify that.

19 THE COURT: I am going to send them home in a
20 little while.

21 MR. ROSENTHAL: Judge, may I make a statement
22 on the record? I tried to catch you the last time the
23 jury was in, but your Honor had already gone to your cham-
24 bers, so we agreed we would save it till now.

25 I think the original note from the jury came in

1
2 about 1:00 in which they requested the tapes of the hotel
3 meetings, Exhibits 3 and 4, and I think it was approxi-
4 mately 2:00 or shortly thereafter that your Honor gave
5 the Forelady the transcripts of those tapes, and she took
6 them into the jury room with her, and she was to come back
7 and report as to any particular portion of the tapes they
8 wanted heard.

9 It is now, I believe, 4:46. They still have, so
10 far as I know, the transcripts in the jury room, and your
11 Honor will recall at the time the transcripts were offered
12 into evidence, I objected to them, fearing just this sort
13 of situation, and the Court assured me that the transcripts
14 would not go into the jury room and that the most that
15 would happen with them would be that the Forelady in the
16 courtroom would be given them so that she might designate--

17 THE COURT: I certainly didn't tell her to keep
18 them and I resent your remarks.

19 MR. ROSENTHAL: I don't mean it towards your
20 Honor.

21 THE COURT: How can I help it? I limited it to
22 one copy and I gave certain instructions. She didn't
23 choose to follow them.

24 I could very well, under the law, let them have
25 the transcripts. I have leaned over backwards in this

1 sljb

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2 case.

3 MR. ROSENTHAL: Probably so, your Honor, and it
4 has been my experience in the past that normally such
5 transcripts are not marked into evidence but are marked
6 for identification. The actual tape that the jury hears
7 is what is in evidence.

8 THE COURT: Can you explain to me how they would
9 be able to hear--

10 MR. ROSENTHAL: What was said in Chinese?

11 THE COURT: --what was said in Chinese?

12 MR. ROSENTHAL: No, they could not.

13 THE COURT: It would be absolutely meaningless.

14 MR. ROSENTHAL: Except by a translation. I agree
15 with the Court. The only reason I am raising this, Judge,
16 is I don't know whether they still want those transcripts,
17 whether they should still have them--

18 THE COURT: If they want them I am going to let
19 them have them. You have raised a point and I am going
20 to let them have them.

21 Now, as to the testimony of Mingo and Wright,
22 that is going to take sometime.

23 We will give them the passport and reentry of
24 Li Ganoza, and I will merely charge them again on con-
25 structive possession, because they are asking me, to say,

in effect, are they guilty or not guilty.

MR. FRANKEL: They should also be charged, I think, on the question of knowledge when it comes to the constructive question.

MR. ROSENTHAL: I think your Honor charge did cover that.

MR. TIMBERS: I would just like to say that I believe it should also be charged in aiding and abetting. I think that is responsive to their question about whether Li Ganoza is responsible for what Lam did as far as the drugs being in his apartment. The jury is obviously concerned about the rationale on which Li Ganoza can be held for what was done in the apartment, and I think the aiding and abetting charge will be responsive.

MR. FRANKEL: They would have asked for the aiding and abetting, your Honor, if they wanted to. They only asked on the question of constructive possession.

(Jury's notes marked Court's Exhibits 8, 9 and 10.)

THE COURT: All right, let's have the jury in.

(End of robing room discussion.)

(In the courtroom in the presence of the jury.)

THE COURT: Mr. Li Ganoza's passport is Government's Exhibit 41, and that will be given to the jury.

Now, I have your question:

"Is a man legally responsible for what may be found in his apartment when he is absent? Does this constitute constructive possession?"

Well, all I can do is repeat what I said before on the matter of constructive possession, because you will have to fit those instructions to the facts as you find the facts to be:

"Possession may be actual, physical possession or constructive possession. A person who knowingly has direct physical possession over a thing at a given time is then in actual possession of it. Constructive possession exists even though a thing is not in the actual, physical possession of a person when a person has dominion and control over that thing.

"Dominion and control means the right to claim the thing and eventually dictate the movement and disposition of it.

"For example, some of you may have been to a restaurant and checked your coat with the doorman or coat check girl as you went in. You may have left your gloves in the pocket of your coat. You may have been given a check with which to claim your coat when you left the restaurant. Even though it's in the actual custody of the

coat check girl, the coat is still yours and the gloves inside the pocket are still yours, and you have a ticket with which to claim the coat and gloves when you left.

"Therefore, in this example, you have constructive possession of the coat and gloves even though they are not at your table.

"In short, it is not necessary for the Government to prove that the defendant had actual, physical possession of the heroin. Proof of constructive possession is sufficient.

"Now, the law also recognizes that possession may be sole or joint. If one person alone has actual or constructive possession of a substance, then possession is sole. If you find from the evidence beyond a reasonable doubt that the defendant Li Ganoza either alone or jointly with others had actual or constructive possession of the heroin described in the indictment, then you may find that such heroin was in the possession of the accused within the meaning of the word "possession" as used in these instructions."

I'm afraid you will just have to apply that to the facts as you find the facts to be.

Now, the other question is: The testimony on Mingo and Wright in the period in Hong Kong.

Do you mean the testimony of Mingo?

THE FORELADY: Yes.

THE COURT: Well, that will take sometime to get together, so I will ask you to resume your deliberations, because I'm going to excuse you at six and have you come back in the morning rather than to keep you here late, or earlier if you would prefer.

THE FORELADY: To be excused today and to come back tomorrow morning?

THE COURT: Yes.

THE FORELADY: (After conferring with jurors) We all feel it would be better to be excused now, your Honor, and come back tomorrow morning.

THE COURT: All right.

Don't discuss it with anybody else, of course.

You have had a long day, and it gets tiring, I know, so if you will come back at 10:00, at that time we will have the testimony separated of Mingo and Wright insofar as it deals with the period of time they were in Hong Kong.

That is the only testimony that you want read?

THE FORELADY: Yes.

THE COURT: Then you will be brought in here and it will be read to you.

EXHIBIT INDEX

<u>Court</u>	<u>Identification</u>	<u>In Evidence</u>
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UNITED STATES OF AMERICA

V.

74 CRIM 846

LAM LEK CHONG, et al

November 11, 1975
10:00 a.m.

oOo

(In the robing room.)

THE COURT: Is there some problem?

MR. TIMBERS: No, your Honor, there is no problem.

I was going to suggest, in view of the extensive passages in Wright and Mingo's testimony about Hong Kong, that the jury be asked whether there is anything specific they want about Hong Kong. By my calculations there are more than 300 pages of testimony.

THE COURT: All right, I will ask them.

MR. ROSENTHAL: A lot of that is colloquy.

THE COURT: What?

MR. ROSENTHAL: A lot of the pages that Mr. Timbers has tallied are colloquy and objections.

THE COURT: I would say there must be at least 200, over 200 pages.

MR. ROSENTHAL: Yes, I would say that, Judge.

MR. TIMBERS: I might also point out for the Court's information that I would estimate about 100 of those pages are about the mistake in paragraph 7 and 8 of the DEA 6 that the defendant Lam put into evidence. I am not sure whether that really relates to Hong Kong, although in fact I have designated all those pages.

THE COURT: All right.

MR. TIMBERS: It may be the jury is not interested in hearing all 100 pages.

THE COURT: Let's bring them in. We will read Mingo first. I will tell them before we do any of the reading that it's going to mean reading certainly well over 200 pages of testimony.

(In open Court - jury present.)

THE COURT: We have, I think, now located all of the testimony of Officers Mingo and Wright in Hong Kong. I might point out that it's well in excess of 200 pages. So if there are any particular items you are interested in hearing about it might be a good idea to indicate that to us now and we can make a further selection or we will go ahead and settle down to some reading.

THE FORELADY: It's just at the points, Judge, where Li Ganoza is involved.

THE COURT: Very well. We can, I assume, go

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through it and pick that out.

MR. TIMBERS: Would you like us to do it right now, your Honor? I don't think it should be very hard on the direct testimony.

THE COURT: Why don't you go back. If that is all you are interested in, it's very easy to get it together.

THE FORELADY: There is something else evidently.

THE COURT: What else?

THE FORELADY: He seems to think the entire testimony and we will look through it, if we can.

THE COURT: You are not allowed to look through it. It will just be read. It has to be read.

You want us to read the whole thing?

THE FORELADY: Evidently.

THE COURT: All right. Go ahead.

(Record read.)

THE FORELADY: I think we have had enough. Evidently the jury is satisfied.

THE COURT: You are welcome to hear it all.

Why don't you resume your deliberations.

(Jury left the courtroom.)

(12:01 p.m. - in the courtroom.)

THE COURT: Are we all set?

MR. FRANKEL: We just disagree on two sentences:

"Q Did you have any further conversation with the defendants in Hong Kong?

"A Yes.

"Q When, about?

"A Later on that evening."

Those are the few sentences at the end of the testimony they want.

THE COURT: Well, the note reads:

"Your Honor, one of the jurors wants to hear the part of the testimony where Mingo said that Lam said he would make himself hostage while Wright is testing the heroin in another hotel."

MR. FRANKEL: We have agreed on what we want.

THE COURT: What does the talk about another meeting have to do with it?

MR. FRANKEL: It just shows that that conversation ended. In other words, it is three lines:

"Q Did you have any further conversation with the defendants in Hong Kong?

"A Yes.

"Q When, about?

"A Later on that evening."

I wanted to show that the conversation ended at that point.

THE COURT: I think that's kind of silly. I'm going to give them just what they have asked for. I am not going to put in whether anything further happened.

MR. FRANKEL: All right.

(The jury entered the courtroom.)

THE COURT: I have a note from the jury which reads:

"Your Honor, one of the jurors wants to hear the part of the testimony where Mingo said that Lam said he would make himself hostage while Wright is testing the heroin in another hotel."

(Portion of testimony requested read to the jury, and the jury left the courtroom.)

(Note marked Court's Exhibit 11.)

THE COURT: Now I want to have the portion of the minutes of the conference in the robing room where these statements were made. Do you know if you recall when that was?

MR. TIMBERS: It is at the end of David Chan's cross examination, your Honor.

THE COURT: All right.

1
2 MR. TIMBERS: Your Honor, the order in which we
3 are going to proceed is not clear to me. I would suggest
4 that since this is a contention made by the defendants,
5 that they put on their witness first so we can understand
6 what their contention is and answer that with Agent Gart-
7 land's testimony.

8 THE COURT: Well, then let us have Mr. Rosenthal
9 put what his contention is on the record once we find the
10 portion of the minutes we are referring to.

11 We will take a short recess.

12 (Recess.)

13 (In the robing room.)

14 (Present: Mr. Rosenthal and Mr. Timbers.)

15 MR. ROSENTHAL: Judge, basically this hearing
16 will concern my client's efforts at cooperation, and I
17 don't know whether it presents a problem. I think it does
18 present a problem to him to have the other defendants
19 cognizant and present at the hearing.

20 THE COURT: Well, I think that is true. Maybe
21 that should wait until we get some decision one way or the
22 other from the jury. We don't want to keep them out and
23 have the jury come in. It makes it even more noticeable.

24 Why don't we defer this until after we get a
25 verdict?

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MR. ROSENTHAL: I think that would be better.

MR. TIMBERS: That is agreeable to the Government.

MR. ROSENTHAL: I might say that this thought did not occur to me, but Mr. Timbers was fair enough to suggest I discuss it with my client.

THE COURT: Yes, I think that is the safest thing to do.

(End of robing room discussion.)

(At 4:30 a note was received from the jury.)

(In open Court.)

THE COURT: I have a note from the jury. I guess it must have been written sometime after 3:30, between 3:30 and now, ten minutes of four.

"We have agreed on a count of the indictment. We have been unable to agree on another count of the indictment. This disagreement is based on the steadfast belief by some jurors that there is a reasonable doubt. We can see no way to reconcile these differences. We would like the guidance of the Court in this matter."

I think the only thing we can do is to call them in and ask them to announce the verdict they are in agreement on and then ask them if they feel, to get it on the Court record, whether further deliberation as to the count that they are in disagreement on would serve any useful purpose.

MR. TIMBERS: Your Honor, the Government would propose that we proceed by receiving the verdict and then, before asking them about the other count--

THE COURT: That is what I said I am going to do.

MR. TIMBERS: Before asking about that, dismissing them based on what they say about the first count, it seems to me there are several things we might do at that

point, and perhaps instead of asking them immediately whether further deliberation would be worthwhile perhaps they should be dismissed or sent back to the jury room after they announce their verdict on the one count and we can discuss what should be done at that point.

THE COURT: It's all right with me.

(Court's Exhibit 12 marked for identification.)

(Jury present.)

THE COURT: I understand that you are in agreement on one count. Is that correct?

THE FORELADY: Yes.

THE CLERK: Ladies and gentlemen of the jury, would you please answer as your name is called.

(Jury role called - all present.)

THE CLERK: Madam Forelady, have the jury agreed on a verdict as to Count 1 as to the defendant Lam Lek Chong?

THE FORELADY: Yes.

THE COURT: Have you reached a verdict as to the first count?

THE FORELADY: Yes, we have.

THE CLERK: How do you find the defendant Lam Lek Chong, also known as Jimmy Lam, on Count 1?

THE FORELADY: On Count 1.

THE CLERK: How do you find the defendant?

THE FORELADY: Yes, we find him guilty.

THE CLERK: How do you find the defendant Yuk Choi Chung, also known as David Chan, on Count 1?

THE FORELADY: Count 1, conspiracy? Yes, we found him guilty.

THE CLERK: How do you find the defendant Francisco Li Ganoza on Count 1?

THE FORELADY: Yes, on Count 1.

THE COURT: You find him guilty?

THE FORELADY: We found him guilty on Count 1, conspiracy.

THE CLERK: Ladies and gentlemen, listen to your verdict as it stands recorded on Count 1 of indictment 74 Cr. 846.

Lam Lek Chong, also known as Jimmy Lam, you find him guilty on Count 1.

Yuk Choi Chung, also known as David Chan, guilty on Count 1.

Francisco Li, also known as Francisco Li Ganoza, guilty on Count 1.

(Each juror, upon being asked "Is that your verdict," answered in the affirmative.)

THE COURT: Very well. I am going to ask you

for the time being to return and deliberate for a short time on the remaining count and see if there is any possibility of reaching a verdict. I will not keep you certainly for more than a half hour.

THE FORELADY: Your Honor, we were on the verge of almost reaching agreement.

THE COURT: Why don't you go back and discuss it. If you could let me know in about a half hour or so whether you think there is any possibility of reaching a verdict--

THE FORELADY: Yes.

(Jury left the courtroom.)

THE COURT: We will await their further deliberation.

(Continued on page 1842.)

(4:45 p.m. - in the courtroom.)

THE COURT: I have just received another note:

"Your Honor, we are deadlocked on the second count of the indictment."

I see no purpose in asking them to deliberate any further on that.

MR. TIMBERS: Your Honor, the Government consents to dismissing the jury at this time and leaving this count hung.

THE COURT: All right, bring the jury in.

We will mark this as a Court's Exhibit.

(Court's Exhibit 13 marked.)

(The jury entered the courtroom.)

THE COURT: I take it from the note that I received that you do not see any likelihood of returning a verdict on the second count.

I will excuse you, then, and I want to express my gratitude to you for the time and attention that you have given to this case.

I don't make a practice of commenting on verdicts, but I certainly feel that I can express to you the thanks of the Court for having faithfully discharged a very heavy burden that was placed on you.

You are excused from further service.

(The jury was discharged and left the courtroom.)

THE COURT: Mr. Corriero, I understand you want to have the writ adjourned until the day of sentence?

MR. CORRIERO: Yes, your Honor.

THE COURT: Very well, I will set the date for sentence for December 18th.

Is that satisfactory to counsel?

MR. FRANKEL: Yes.

MR. ROSENTHAL: Yes.

MR. TIMBERS: Your Honor, may we make that at 9:30 in the morning? I have a trial on the 18th.

THE COURT: Very well. I probably have a trial myself.

Now what is the bail?

MR. TIMBERS: Your Honor, the Government would like to apply for an increase in the bail of the two defendants who are now presently incarcerated. My understanding is that Mr. Li Ganoza's bail is presently \$10,000 cash and surety. The Government applies that that bail be increased to \$25,000 cash and surety.

THE COURT: Is that Mr. Li Ganoza?

MR. TIMBERS: Mr. Johnson tells me I have the wrong figures.

MR. FRANKEL: I think it is \$10,000 or \$2,000 in

cash, and the \$2,000 is up.

MR. TIMBERS: The Government, in any case, applies that that bail be increased to \$25,000 cash or surety.

MR. FRANKEL: Would your Honor hear me on that?

MR. TIMBERS: Perhaps I should state my reasons.

MR. FRANKEL: Go ahead.

MR. TIMBERS: As I understand it, Mr. Li Ganoza is presently not employed and has no relatives in the United States, or any other roots in the United States that would keep him here.

He has contacts abroad that the Government submits makes it likely that he would flee.

He was born in Peru. We heard during this trial that he made two trips to Hong Kong. He apparently has numerous contacts in Hong Kong, if his testimony about marrying somebody in Hong Kong is to be believed; somebody must have made the introduction in Hong Kong.

If Jimmy Lum's statements on the telephone are to be believed about importing heroin from Hong Kong, he must have somebody in Hong Kong who has been sending that to him.

In addition, he apparently has substantial wealth. At the time he was arraigned he said that he had invested \$10,000 in the China Doll Restaurant. He has now sold

that restaurant.

Mr. Frankel indicated that he used part of the receipts from that sale to make trips, the two trips to Hong Kong.

In any case, it is fairly clear that he has been traveling extensively, and does have some way of supporting himself, and, therefore, the Government submits that a substantial bail should be set because a lower bail would be meaningless in terms of keeping him here.

MR. FRANKEL: Your Honor, he does have contacts in Hong Kong. He has a wife there. I don't know what other relatives he has there, but he does have friends in this country who put up the bail for him, and he averred to pay them back the \$2,000.

He is presently employed, except during this trial he wasn't working except weekends he works in a restaurant; I have the card, and he lives right near that restaurant, and where he lived is Lyons Avenue in Newark, and the restaurant is in Newark, not Elizabeth and not Jersey City, as some of the testimony was.

As to the sale of the restaurant, he sold the small restaurant that he had in order to get a small interest in the China Doll, and if your Honor knows these Chinese customs, they purchase small interests, and they become

part owners, and he became the cook in the China Doll, and he lived in this little flat on East 3rd Street, which is another one of those awful places I wouldn't reside in.

Now I do have his passport; I have had his passport in my possession from the very beginning, and I wasn't asked to take it, and I told the Court, however, that I would keep the passport just for surety. I will still keep that passport. I certainly won't give it to him. I am an officer of the Court, and I don't think this man is running. He has many friends who have interests in his welfare, not narcotics people, restaurant people.

THE COURT: I am aware of that, Mr. Frankel.

MR. FRANKEL: I think that is all I can add.

He has not a great deal of wealth. He paid me piece-meal.

THE COURT: I recognize that. However, I'm going to set the bail at \$25,000 as requested by the Government in cash and security. He will be remanded until he makes that bail.

MR. FRANKEL: No cash alternatives?

THE COURT: What?

MR. FRANKEL: From the \$25,000 security, any cash alternative which is less than that?

THE COURT: No.

MR. TIMBERS: Your Honor, I would also ask that the defendant Li Ganoza surrender his passport to the U.S. Attorney's office.

THE COURT: Yes.

MR. FRANKEL: It is right here. I was going to keep it myself.

THE COURT: Now, how about Yuk Choi Chung?

MR. ROSENTHAL: In respect to Yuk Choi Chung, your Honor--well, you should go forward, Mr. Timbers.

MR. TIMBERS: The Government applies that his bail be increased to \$10,000 cash or surety. My notes are that it is presently \$10,000 PRB secured by \$2,000 cash.

The Government asks that it be increased to \$10,000 cash or surety for the following reasons:

First and foremost, Yuk Choi Chung is not a citizen of the United States. He is an alien, and as I understand his present situation, he is more than likely to be deported as a result of this conviction. I believe that that gives him all the motive in the world to flee prior to his sentence, since he knows that as a result of his conviction he is going to have to leave the country anyway.

A person might in such a situation say, well,

I will leave now before sentencing in order to avoid having to go to jail before I am deported.

We have heard during the trial that he has numerous contacts abroad. His business is a worldwide business with offices in Germany and southeast Asia.

Also, he has substantial wealth. At the time he was interviewed prior to his arraignment he said that he had \$20,000 to \$30,000 savings invested in his business.

As with Li Ganoza, the Government submits the fact that he does have that substantial amount of wealth makes it necessary that a substantial cash bail be set so that he will have an incentive to return here for sentencing.

MR. ROSENTHAL: Your Honor has heard and it is a fact that the defendant is married. In fact, his wife has been in Court here practically every day that this trial has been proceeding. She is here right now.

He has two small children, I think aged five and seven or five and eight, both of whom or all of whom are in this country.

So far as his great wealth is concerned--and I don't find any reference to the copy of the statement that I have that was given to Mr. Nesland--any reference as to investment in his business may very well have been true

1 prior to August of 1974. But the fact is that the business
2 in question did fail and he is now working for Mr. Jeffrey
3 Ung who acted as interpreter here and who has been in
4 Court here whenever his time would permit.
5

6 The \$2,000 that is on deposit as security for
7 his personal recognizance bond was furnished not by the
8 defendant, because he didn't have it, but was furnished
9 by his sister-in-law, May Looie, who at that time was a
10 high school teacher in the system, in the high school
11 system of the City of New York, and who is now employed by
12 me as a secretary.

13 I don't know how to prove somebody won't run
14 away. I have never been able to figure that out. But all
15 I can go by is the past performance of the defendant, in
16 that he has always been in Court on time. Ahead of time.

17 In addition to that, I will state to your Honor
18 that I have represented people of the Chinese race for some
19 40 odd years, and the only forfeiture that I ever--well,
20 I didn't sustain--but the only forfeiture that the Court
21 ever sustained was in a gambling case where I represented
22 a defendant in the State Court and he failed to appear in
23 the morning, and that afternoon I learned that he had
24 dropped dead on his way to Court while having coffee in
25 the coffee shop on either Mulberry Street or Bayard Street.

That is all I can tell the Court. I know in my bones - it is a guts reaction - that he will be here. He is here; his wife is here; his employer is here.

THE COURT: Well, I am setting his bail at \$7500 cash and I will consider a possible reduction when I have given it a little more thought.

MR. ROSENTHAL: Would your Honor give us until tomorrow morning to see if we can furnish it or surrender?

THE COURT: Is that agreeable to the Government?

MR. TIMBERS: Your Honor, the Government opposes an extension of time.

THE COURT: Well, then I will have to remand him.

Now with respect to Lam Lek Chong, he is already in custody?

MR. CORRIERO: Yes, your Honor, he is in custody.

THE COURT: So there is no purpose. Since I am not satisfying the writ he will be right here.

MR. CORRIERO: Thank you, your Honor.

MR. TIMBERS: I don't have his present bail.

Mr. Johnson, do you have it, on Lam Lek Chong?

MR. CORRIERO: I believe he is on recognizance.

As a matter of fact--

THE CLERK: He is here on a writ. Our bail is ROR.

MR. TIMBERS: What bail is the State bail?

MR. CORRIERO: He has been sentenced.

MR. TIMBERS: Oh.

One final point: Apparently Mr. Li Ganoza moved since he was interviewed prior to his arraignment. Could I have his current address?

MR. FRANKEL: If he is bailed, he will be happy to give you the address.

MR. TIMBERS: I was wondering what his address was when he came to the Court House this morning.

MR. FRANKEL: I will furnish it to you. I will get the card where he works. I have got it somewhere.

THE COURT: You want to reserve motions until the day of sentence?

MR. CORRIERO: Yes, your Honor.

THE COURT: Whatever is agreeable.

MR. CORRIERO: We would reserve motions until the date of sentence.

Now with respect to that hearing tomorrow morning, I will have difficulty being here, and I don't know whether I am going to be allowed to participate, although I would want to. The defendant need not be present.

THE COURT: No. We will need Mr. Yuk Choi Chung.

MR. ROSENTHAL: Right, we need Yuk Choi Chung--

1
2 THE COURT: I don't have my calendar, but why don't
3 I get in touch with both of you gentlemen and see if we can
4 agree on some date.

5 How long do you think the hearing would take?

6 MR. CORRIERO: An hour and a half at most.

7 MR. ROSENTHAL: Your Honor recalls I am scheduled
8 to start a case before Judge Brieant on the 17th, which is
9 next Monday, which will be almost as long as this, and there
10 will be a lot of tapes involved, and what-not. I don't
11 think the hearing should take more than an hour and a half
12 or two hours at the most.

13 MR. CORRIERO: Can we do it on the date of sen-
14 tencing?

15 MR. ROSENTHAL: I would rather not.

16 THE COURT: What about tomorrow?

17 MR. ROSENTHAL: Tomorrow afternoon I am free,
18 Judge. I think Mr. Corriero is free in the afternoon.
19 Why don't we make it 2:00 tomorrow?

20 THE COURT: I have some hearings.

21 Why don't you call up and check. I may be able
22 to do it around three if we are only going to go for a
23 couple of hours.

24 MR. TIMBERS: Let me say that the Government and
25 its witness are available anytime this week, except Agent

Gartland tells me that Friday would be difficult.

While we are getting a date, perhaps I might apply that whatever motions the defendants are making be set down in writing in some way prior to the sentencing date?

I have had a bad experience with motions that are made returnable on the sentencing date. Very often new arguments are raised at that time, and--

THE COURT: Yes, or I will just have to put over the sentencing. That is the only problem.

So I would suggest that if counsel on their motions, if they can at least set out the substance of the motions so that the Government can be prepared, it would be better to do so, because it just means rescheduling the sentencing if everybody is not prepared.

MR. FRANKEL: I can safely say for the record right now that I move to set aside the verdict on the ground that it is against the weight of the evidence. That is one ground. I don't know what other grounds I will have.

Incidentally, on the question of Mr. Li Ganoza's address, he lives at this restaurant, Kings Restaurant, 248 Lyons Avenue, Newark, New Jersey.

THE COURT: All right, 3:00 tomorrow, and let us see if we can't do it in two hours.

MR. ROSENTHAL: I am sure we can.

May the defendant Chung speak with his wife?

THE COURT: Yes.

(Whereupon, an adjournment was taken to Wednesday,
November 12, 1975, at 3:00 p.m.)

W. V. Chang Rosenthal

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 17 day of Feb, 1976 at No. 1 St. Andrew Place, N.Y.C. deponent served the within *appeal* upon *M. S. Atkinson* the *appellant* herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the *app* therein.

Sworn to before me,
this 17 day of Feb 1976

[Signature]
Edward Bailey

[Signature]

WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1973